

(4462089)

TRANSMITTAL SHEET

TO: CLERK, USCA8

DATE: 10/20/16

FROM: CLERK, U.S. DISTRICT COURT NORTH DAKOTA at Fargo

Phone: 701-297-7000

APPEAL NO.: 16-3978

DISTRICT COURT CASE NO.: 3:16-cv-29

DISTRICT COURT CAPTION: Nathan DuBray vs. Chad Pringle

TRANSMITTED HEREWITH:

- ☒ Original File: Volume(s) Supplement #9 - State Court Record
- ☐ Designated Clerk's Record (3 certified copies)
- ☐ Supplement to Designated Clerk's Record (3 certified copies)
- ☐ Pre-sentence Investigation Report (3 **SEALED** copies)
- ☐ Statement of Reasons (3 **SEALED** copies)
- ☐ Sentencing Recommendations (3 **sealed** copies - **COURT ONLY**)
- ☐ Transcript of Proceedings:

☐ Exhibits:

Plaintiff(s)

Defendant(s)

Court

RECEIVED

OCT 24 2016

U.S. Court of Appeals
Eighth Circuit-St. Paul, MN

COMMENTS:

- ☒ Please return original file to U.S. District Court in Fargo, ND.
- ☐ ECF file does NOT need to be returned to U.S. District Court in



Wayne Stenehjem
ATTORNEY GENERAL

STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

STATE CAPITOL
600 E BOULEVARD AVE DEPT 125
BISMARCK, ND 58505-0040
(701) 328-2210 FAX (701) 328-2226
www.ag.nd.gov

April 20, 2016

Mr. Robert Ansley
Clerk
United States District Court
655 1st Avenue North, Suite 130
Fargo, ND 58102-4932

RE: Nathan G. DuBray v. Chad Pringle, Warden; Case No. 3:16-cv-00029

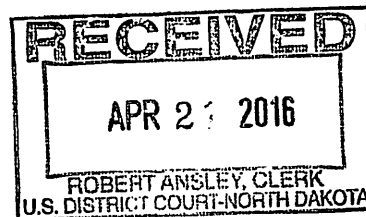
Dear Mr. Ansley:

Enclosed for filing please find the state court records in the above-entitled action. These records are an exception to this Court's electronic case filing requirements as they are state court records in a habeas case filed under 28 U.S.C. § 2254 and pursuant to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts. Thank you for your assistance in this matter.

Sincerely,


Michael T. Mahoney
Assistant Attorney General

Enclosures
cc: Nathan G. DuBray (w/encs.)



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[Back](#)

Location : Northeast Central District [Images](#) [Help](#)

REGISTER OF ACTIONS

CASE No. 18-2012-CR-01960

State of North Dakota vs. Nathan G Dubray

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\$
\$
\$
\$

Case Type: **Felony**
 Date Filed: **08/06/2012**
 Location:
 Judicial Officer: **Kleven, Debbie**

RELATED CASE INFORMATION

Related Cases
 18-2014-CV-00960 (Related Case)

PARTY INFORMATION

Defendant Dubray, Nathan G Jamestown, ND 58401 DL: NDDUB857102	Male Indian DOB: 1985 SSN: XXX-XX-7603 6' 0", 200 lbs	Attorneys Blake Dylan Hankey <i>Retained</i> 701-746-4529 x0000(W)
Plaintiff State of North Dakota		Meredith Huseby Larson 701-780-8281 x0000(W) Mark Jason McCarthy 701-780-8281 x0000(AA)

CHARGE INFORMATION

Charges: Dubray, Nathan G	Statute	Level	Date
1. Gross Sexual Imposition	12.1-20-03	Felony AA	01/02/2012
2. Gross Sexual Imposition	12.1-20-03	Felony AA	01/02/2012

EVENTS & ORDERS OF THE COURT

	DISPOSITIONS
10/04/2013	Plea (Judicial Officer: Kleven, Debbie) 1. Gross Sexual Imposition Guilty
10/04/2013	Plea (Judicial Officer: Kleven, Debbie) 2. Gross Sexual Imposition Guilty
10/04/2013	Disposition (Judicial Officer: Kleven, Debbie) 1. Gross Sexual Imposition Pled Guilty 2. Gross Sexual Imposition Pled Guilty
10/04/2013	Criminal Judgment (Judicial Officer: Kleven, Debbie) 1. Gross Sexual Imposition 01/02/2012 (AA) 12.1-20-03 (1212003) Comment (Credit for time served from September 25, 2012 through October 9, 2012. No contact with the victim or family members. Defendant will successfully complete the sex offender treatment program before being released. Restitution to be determined within 90 days. Restitution for any treatment for the victim is to continue throughout the probationary period.) Condition - Adult: 1. Notify Court of Address Change, 10/04/2013, Active 10/04/2013 2. Supervised Probation, 10 years 10/04/2013, Active 10/04/2013 3. Violate No Criminal Laws, 10/04/2013, Active 10/04/2013 Fee Totals: Criminal Administration Fee \$900.00 Defense/Facility Admin Fee \$100.00 Fee Totals \$ \$0.00 Confinement: Agency: Department of Corrections and Rehabilitation, Term: 30 Years Suspended: 15 Years Probation: 10 Years
10/04/2013	Criminal Judgment (Judicial Officer: Kleven, Debbie) 2. Gross Sexual Imposition 01/02/2012 (AA) 12.1-20-03 (1212003)



	<p>Comment (Credit for time served from September 25, 2012 through October 9, 2012. No contact with the victim or family members. Defendant will successfully complete the sex offender treatment program before being released. Restitution to be determined within 90 days. Restitution for any treatment for the victim is to continue throughout the probationary period.)</p> <p>Condition - Adult:</p> <ol style="list-style-type: none"> 1. Notify Court of Address Change, 10/04/2013, Active 10/04/2013 2. Supervised Probation, 10 years 10/04/2013, Active 10/04/2013 3. Violate No Criminal Laws, 10/04/2013, Active 10/04/2013 <p>Fee Totals:</p> <table> <tr> <td>Criminal Administration Fee</td><td>\$900.00</td></tr> <tr> <td>Defense/Facility Admin Fee</td><td>\$100.00</td></tr> <tr> <td>Fee Totals \$</td><td>\$0.00</td></tr> </table> <p>Confinement:</p> <p>Agency: Department of Corrections and Rehabilitation, Term: 30 Years Suspended: 15 Years Probation: 10 Years Concurrent With: Count 1</p>	Criminal Administration Fee	\$900.00	Defense/Facility Admin Fee	\$100.00	Fee Totals \$	\$0.00
Criminal Administration Fee	\$900.00						
Defense/Facility Admin Fee	\$100.00						
Fee Totals \$	\$0.00						
12/30/2013	<p>Amended Amended Criminal Judgment (Judicial Officer: Kleven, Debbie) Reason: Court Order</p> <p>1. Gross Sexual Imposition 01/02/2012 (AA) 12.1-20-03 (1212003)</p> <hr/> <p>Comment (Credit for time served from September 25, 2012 through October 9, 2012. No contact with the victim or family members. Defendant will successfully complete the sex offender treatment program before being released. Restitution to be determined within 90 days. Restitution for any treatment for the victim is to continue throughout the probationary period.)</p> <p>Condition - Adult:</p> <ol style="list-style-type: none"> 1. Notify Court of Address Change, 10/04/2013, Active 10/04/2013 2. Supervised Probation, 10 years 10/04/2013, Active 10/04/2013 3. Violate No Criminal Laws, 10/04/2013, Active 10/04/2013 4. Restitution, Restitution in the amount of \$5,265.53 at this time, with restitution being left open through the period of supervised probation, to be paid in full prior to the expiration of supervised probation. 12/30/2013, Active 12/30/2013 <p>Fee Totals:</p> <table> <tr> <td>Criminal Administration Fee</td><td>\$900.00</td></tr> <tr> <td>Defense/Facility Admin Fee</td><td>\$100.00</td></tr> <tr> <td>Fee Totals \$</td><td>\$0.00</td></tr> </table> <p>Confinement:</p> <p>Agency: Department of Corrections and Rehabilitation, Term: 30 Years Suspended: 15 Years Probation: 10 Years</p>	Criminal Administration Fee	\$900.00	Defense/Facility Admin Fee	\$100.00	Fee Totals \$	\$0.00
Criminal Administration Fee	\$900.00						
Defense/Facility Admin Fee	\$100.00						
Fee Totals \$	\$0.00						
	<p>OTHER EVENTS AND HEARINGS</p> <p>08/06/2012 <u>Affidavit of Probable Cause</u> Doc ID# 1</p> <p>08/06/2012 <u>Information</u> Doc ID# 2</p> <p>08/06/2012 <u>Warrant of Arrest Issued</u></p> <p>08/09/2012 <u>Notice</u> Doc ID# 3</p> <p><u>Notice of Change of Assignment of Attorney</u></p> <p>08/09/2012 <u>Service Document</u> Doc ID# 4</p> <p><u>Affidavit of Service by Mail</u></p> <p>09/25/2012 <u>Notice</u> Doc ID# 7</p> <p><u>Notice of Appearance</u></p> <p>09/25/2012 <u>Service Document</u> Doc ID# 8</p> <p><u>Certificate of Service</u></p> <p>09/26/2012 <u>Warrant of Arrest Served</u> Doc ID# 5</p> <p>09/26/2012 <u>Notice to Defendant and Consent to ITV</u> Doc ID# 6</p> <p>09/26/2012 <u>Initial Appearance</u> (3:00 PM) (Judicial Officer Jahnke, Lawrence E) KA-STENO 9/26/12 Result: Hearing Ended</p> <p>09/26/2012 <u>Notice of Assignment and Case Number</u> Doc ID# 9</p> <p>09/26/2012 <u>Service Document</u> Doc ID# 10</p> <p><u>Certificate of Service</u></p> <p>09/26/2012 <u>Notice of Hearing</u> Doc ID# 11</p> <p><u>Preliminary & Arraignment Hearing Notice</u></p> <p>09/26/2012 <u>Order</u> Doc ID# 12</p> <p><u>Appearance Bond Ordered</u></p> <p>09/26/2012 <u>No Contact Order</u> Doc ID# 13</p> <p>10/02/2012 <u>Service Document</u> Doc ID# 14</p> <p><u>certificate of service-Notice of bond hearing</u></p> <p>10/02/2012 <u>Notice of Hearing</u> Doc ID# 15</p> <p><u>bond hearing</u></p> <p>10/04/2012 <u>Service Document</u> Doc ID# 16</p> <p><u>certificate of service-notice of bond hearing-cont</u></p> <p>10/04/2012 <u>Notice of Hearing</u> Doc ID# 17</p> <p><u>cont bond hearing</u></p> <p>10/04/2012 <u>Rule 16 Discovery Request</u> Doc ID# 18</p> <p><u>State's Reciprocal Discovery Request</u></p> <p>10/04/2012 <u>Service Document</u> Doc ID# 19</p> <p><u>Affidavit of Service by Electronic Filing</u></p> <p>10/08/2012 <u>Bond</u> Doc ID# 20</p> <p><u>bond posted</u></p> <p>10/09/2012 <u>Bond Hearing</u> (3:30 PM) (Judicial Officer Kleven, Debbie) Set at \$50,000 L</p> <p><u>Parties Present</u></p> <p>10/04/2012 Continued to 10/09/2012 - Continuance - Other - Dubray, Nathan G</p>						

10/11/2012 Result: Hearing Ended
Subpoena Doc ID# 21
 Jeremy Moe

10/11/2012 Service Document Doc ID# 22
 sheriff return

11/26/2012 CANCELED Preliminary Hearing (2:00 PM) (Judicial Officer Vigeland, David)
 Other
 MB-STENO 11/27/12

11/27/2012 Waiver Doc ID# 23
 Of Preliminary Hearing

12/04/2012 Arraignment (10:45 AM) (Judicial Officer Kleven, Debbie)
 MA-Steno 12-4-12
Parties Present
 Result: Hearing Ended

12/04/2012 Notice of Hearing Doc ID# 24
 Notice of Pretrial Conference

12/05/2012 Service Document Doc ID# 25
 Certificate of Service

12/31/2012 Notice Doc ID# 26
 Rule 3.2 Notice of Motion

12/31/2012 Motion Doc ID# 27
 Motion to Amend Information

12/31/2012 Brief Doc ID# 28
 Brief in Support of Motion to Amend Information

12/31/2012 Proposed Order Doc ID# 29
 Order Granting Motion to Amend Information

12/31/2012 Brief Doc ID# 30
 (Proposed) Amended Information

12/31/2012 Service of Motion Doc ID# 31
 Affidavit of Service by Mail

12/31/2012 Notice Doc ID# 32
 Notice of Intent to Present

12/31/2012 Exhibit Doc ID# 33
 State's Exhibit 1 (Report of Dr. Graff)

12/31/2012 Exhibit Doc ID# 34
 State's Exhibit 2 - copy (original CD in basement vault)

12/31/2012 Motion Doc ID# 35
 Motion to Seal

12/31/2012 Brief Doc ID# 36
 Brief in Support of Motion to Seal

12/31/2012 Proposed Order Doc ID# 37
 Order Granting Motion to Seal

12/31/2012 Service of Motion Doc ID# 38
 Affidavit of Service by Mail

01/10/2013 Pretrial Conference (10:45 AM) (Judicial Officer Medd, Joel D)
 DM-steno 1-10-13
Parties Present
 Result: Hearing Ended

01/10/2013 Order Doc ID# 39
 Final Jury Trial Order

01/10/2013 Proposed Order Doc ID# 41
 Final Jury Trial Order

01/10/2013 Service Document Doc ID# 42
 Certificate of Service

01/24/2013 Order Disposing of Motion Doc ID# 43
 Order Granting Motion to Seal

01/24/2013 Order Disposing of Motion Doc ID# 44
 Order to Amend Information

01/24/2013 Information Doc ID# 45
 Amended

02/01/2013 Service of Motion Doc ID# 46
 Affidavit of Service By Electronic Filing

02/01/2013 Notice Doc ID# 47
 Rule 3.2 Notice of Motion

02/01/2013 Motion Doc ID# 48
 Motion to Appoint a Guardian ad Litem

02/01/2013 Brief Doc ID# 49
 Brief in Suppot of Motion to Appoint a Guardian ad Litem

02/01/2013 Proposed Order Doc ID# 50
 Order

03/06/2013 Order Disposing of Motion Doc ID# 51
 Order Appointing Guardian Ad Litem

03/06/2013 Order Doc ID# 52
 Guardian ad Litem Confidential Information Sheet and Order

04/21/2013 Instructions Doc ID# 53
 Defendant's Proposed Jury Instructions

04/21/2013 Service Document Doc ID# 54
 Certificate of Service - Defendant's Proposed Jury Instructions

04/23/2013 Final Dispositional Conference (2:30 PM) (Judicial Officer Kleven, Debbie)
 (Send copy of all hearing notices to Guardian ad Litem)
Parties Present
 Result: Hearing Ended

04/23/2013 Instructions Doc ID# 55

04/23/2013 Proposed Plaintiff's Requested Jury Instructions
Notice Doc ID# 56
 Notice of State's Witnesses
 04/23/2013 Notice Doc ID# 57
 State's Exhibit List
 04/23/2013 Service Document Doc ID# 58
 Affidavit of Service by Mail
 04/25/2013 Service Document Doc ID# 59
 Certificate of Service
 04/25/2013 Proposed Order Doc ID# 60
 Amended Final Jury Trial Order
 04/30/2013 CANCELED Felony Jury Trial (9:00 AM) (Judicial Officer Kleven, Debbie)
 Other
 (Send copy of all hearing notices to Guardian ad Litem)
 05/02/2013 CANCELED Felony Jury Trial (9:00 AM) (Judicial Officer Kleven, Debbie)
 Other
 (Send copy of all hearing notices to Guardian ad Litem)
 05/03/2013 CANCELED Felony Jury Trial (9:00 AM) (Judicial Officer Kleven, Debbie)
 Other
 (Send a guardian ad litem copy of all hearing notices)
 05/10/2013 Proposed Order Doc ID# 61
 2nd Amended Final Jury Trial Notice
 05/10/2013 Service Document Doc ID# 62
 05/13/2013 Order Doc ID# 63
 Amended Final Jury Trial Order
 06/21/2013 Order Doc ID# 64
 Approving Jury Questionnaire
 06/21/2013 Exhibit Doc ID# 65
 B
 07/03/2013 Service Document Doc ID# 66
 Affidavit of Service By Electronic Filing
 07/03/2013 Report Doc ID# 67
 Amended State's Exhibit List
 07/03/2013 Service Document Doc ID# 68
 Certificate of Service
 07/03/2013 Notice of Hearing Doc ID# 69
 Status Conference Notice
 07/15/2013 Status Conference (9:00 AM) (Judicial Officer Kleven, Debbie)
 (Send copy of all hearing notices to Guardian ad Litem)/Steno (MA) 7-15-13
 04/30/2013 Reset by Court to 07/15/2013
 Result: Hearing Ended
 07/15/2013 Order for PSI Doc ID# 70
 and Sentencing Hearing Notice
 07/15/2013 Service Document Doc ID# 71
 Certificate of Service
 07/16/2013 CANCELED Felony Jury Trial (9:00 AM) (Judicial Officer Kleven, Debbie)
 Case Settled
 (Send copy of all hearing notices to Guardian ad Litem)
 05/01/2013 Reset by Court to 07/15/2013
 09/10/2013 Pre-Sentence Investigation Doc ID# 72
 PSI
 09/10/2013 Pre-Sentence Investigation Doc ID# 73
 PSI Addendum
 09/13/2013 Statement Doc ID# 74
 Victim Impact Statement for PSI
 09/16/2013 Order Doc ID# 75
 Releasing Victim Impact Statement
 09/16/2013 Order Doc ID# 76
 Releasing PSI
 09/26/2013 No Contact Order Expired Doc ID# 77
 10/04/2013 Sentencing (9:00 AM) (Judicial Officer Kleven, Debbie)
 10/04/2013, 10/04/2013
 to take all morning (DVD in 1st Floor Clerk Vault) MA-STENO 10/4/13
 Parties Present
 Result: Hearing Ended
 10/04/2013 Criminal Judgment Doc ID# 78
 with Appendix "A"
 10/04/2013 Statement Doc ID# 79
 Of Reasons For Sentence
 12/04/2013 Notice Doc ID# 80
 Rule 3.2 Notice of Motion
 12/04/2013 Motion Doc ID# 81
 Motion For Restitution
 12/04/2013 Brief Doc ID# 82
 Brief in Support of Motion For Restitution
 12/04/2013 Affidavit Doc ID# 83
 Affidavit of Restitution Coordinator and Statement of Proof
 12/04/2013 Proposed Order Doc ID# 84
 Order Granting Motion For Restitution
 12/04/2013 Service of Motion Doc ID# 85
 Affidavit of Service By Electronic Filing
 12/30/2013 Order Disposing of Motion Doc ID# 86
 Order Granting Motion For Restitution

12/30/2013	<u>Proposed Order</u>	Doc ID# 87
	<i>Amended Criminal Judgment (count 1) Criminal Judgment (count 2)</i>	
01/03/2014	<u>Criminal Judgment</u>	Doc ID# 88
	<i>Amended Criminal Judgment (count 1) Criminal Judgment (count 2)</i>	
07/17/2014	<u>Exhibit</u>	Doc ID# 89
	<i>Exhibit Disposition Form</i>	
03/09/2015	<u>Clerk's Certificate on Appeal</u>	Doc ID# 90
03/09/2015	<u>Transcript</u>	Doc ID# 91
	<i>Sealed Redacted Text Key from Change of Plea hearing held on 7-15-2013</i>	
03/09/2015	<u>Transcript</u>	Doc ID# 92
	<i>Redacted Text Key of Sentencing hearing held on 10-04-2013</i>	
03/09/2015	<u>Transcript</u>	Doc ID# 93
	<i>Transcript of Sentencing held on 10-04-13</i>	
03/09/2015	<u>Transcript</u>	Doc ID# 94
	<i>Change of Plea hearing held 7-15-2013</i>	
03/10/2015	<u>Clerk's Certificate on Appeal</u>	Doc ID# 95
12/28/2015	<u>Notice</u>	Doc ID# 96
	<i>of Motion</i>	
12/28/2015	<u>Motion</u>	Doc ID# 97
	<i>Motion to Withdraw Guilty Plea</i>	
12/28/2015	<u>Brief</u>	Doc ID# 98
	<i>In Support of Motion to Withdraw Guilty Plea</i>	
12/28/2015	<u>Affidavit</u>	Doc ID# 99
	<i>of Nathan G Dubray in Support of Motion to Withdraw Guilty Plea</i>	
12/28/2015	<u>Demand for Change of Judge</u>	Doc ID# 100
12/28/2015	<u>Letter</u>	Doc ID# 101
	<i>Requesting Counsel</i>	
12/28/2015	<u>Request</u>	Doc ID# 102
	<i>for Hearing on Motion to Withdraw Guilty Plea</i>	
12/28/2015	<u>Service Document</u>	Doc ID# 103
	<i>Certificate of Service</i>	
12/28/2015	<u>Order</u>	Doc ID# 104
	<i>Order Denying Demand for Change of Judge</i>	
12/28/2015	<u>Service Document</u>	Doc ID# 105
	<i>Certificate of Service</i>	
12/29/2015	<u>Service Document</u>	Doc ID# 106
	<i>Certificate of Service</i>	
12/29/2015	<u>Notice of Hearing</u>	Doc ID# 107
	<i>Motion Hearing Notice</i>	
01/06/2016	<u>Proposed Order</u>	Doc ID# 108
	<i>Application for Appointed Counsel</i>	
01/07/2016	<u>Service Document</u>	Doc ID# 109
	<i>Affidavit of Service By Mail</i>	
01/07/2016	<u>Brief</u>	Doc ID# 110
	<i>State's Brief in Opposition to Defendant's Motion to Withdraw Guilty Plea</i>	
01/12/2016	<u>Order</u>	Doc ID# 111
	<i>Order Denying Application for Court-Appointed Attorney and Order Denying Motion to Withdraw Guilty Plea</i>	
01/12/2016	<u>Service Document</u>	Doc ID# 112
	<i>Certificate of Service of Order Denying Application for Court-Appointed Attorney and Order Denying Motion to Withdraw Guilty Plea</i>	
01/29/2016	<u>CANCELED</u>	Motion/Hearing (1:30 PM) (Judicial Officer Kleven, Debbie)
	<i>Other</i>	
	<i>Motion To Withdraw Guilty Plea</i>	

FINANCIAL INFORMATION

	Defendant Dubray, Nathan G	
	Total Financial Assessment	1,000.00
	Total Payments and Credits	1,000.00
	Balance Due as of 04/19/2016	0.00
10/04/2013	Transaction Assessment	1,000.00
10/04/2013	Waived	(1,000.00)

ORIGINAL

DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

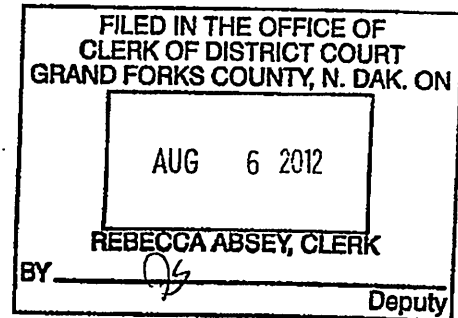
State of North Dakota,

Plaintiff,

v

Nathan Gene Dubray,

Defendant.



INFORMATION

Court No.

SA#121086 18-2012CR1960

M. Jason McCarthy, ND Bar ID #05656 in and for the County of Grand Forks, in the State of North Dakota, gives this Court to understand and be informed:

COUNT I:

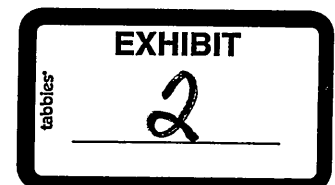
That between the 2nd day of January, 2012, and the 3rd day of January, 2012, within the County of Grand Forks in the State of North Dakota, one Nathan Gene Dubray did commit the crime of **GROSS SEXUAL IMPOSITION**, in violation of Sections 12.1-20-03(1)(d), 12.1-20-03(3)(a) and 12.1-32-01(1) of the North Dakota Century Code, a Class AA Felony, by then and there being an actor at least twenty two years of age and engaging in or causing another to engage in a sexual act with a victim less than fifteen years of age; To wit: That Nathan Gene Dubray, being an actor at least twenty two years of age did engage in or cause another to engage in a sexual act when the Defendant engaged in a sexual act with an 8 year old juvenile victim including but not limited to sexual contact between the Defendant's exposed penis and the victim's face and the Defendant's hand and the victim's vulva. This taking place at 2839 20th Avenue South, Building D, in Grand Forks, North Dakota.

COUNT II:

That on or about the 2nd day of January, 2012, within the County of Grand Forks in the State of North Dakota, one Nathan Gene Dubray did commit the crime of **GROSS SEXUAL IMPOSITION**, in violation of Sections 12.1-20-03(1)(d), 12.1-20-03(3)(a) and 12.1-32-01(1) of the North Dakota Century Code, a Class AA Felony, by then and there being an actor at least twenty two years of age and engaging in or causing another to engage in a sexual act with a victim less than fifteen years of age; To wit: That Nathan Gene Dubray, being an actor at least twenty two years of age, did engage in or cause another to engage in a sexual act when the Defendant engaged in a sexual act with an 8 year old juvenile victim including contact between the Defendant's exposed penis and the victim's hand and the Defendant's hand and the victim's vulva. This taking place at 2839 20th Avenue South, Building D, in Grand Forks, North Dakota.

Names of all witnesses for the prosecution known to State's Attorney at this date:

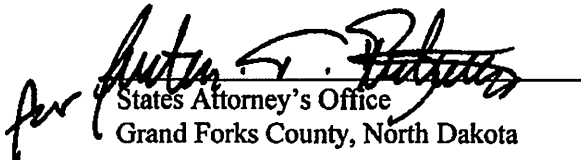
Jeremy Moe, Grand Forks Police Department
Travis Michael Benson, Grand Forks Police Department
Brett Johnson, Grand Forks Police Department



Shawn Thompson, Grand Forks Police Department
Wesley Vert III, Grand Forks Police Department
DaLee M Wilkinson, Grand Forks Police Department
Gerald White Jr., Bureau of Indian Affairs
Mario Alcon
Bobby Joe Bull
Arne H. Graff MD
Tori Killscrow
Yvonne Killscrow
Tammy C. Knudson LSW
Carrie Simonson R.N.
Shelby Joleen Weist
Juvenile M.I.W.
Altru Hospital Personnel
Grand Forks County Social Services Personnel
Bureau of Indian Affairs Personnel

This contrary to the statute and against the peace and dignity of the State of North Dakota.

Dated at Grand Forks, North Dakota, this 2nd day of August, 2012.



States Attorney's Office
Grand Forks County, North Dakota

IR#201200059

jlf

1 **IN DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA**

2 **STATE OF NORTH DAKOTA,**

3 Plaintiff,

4 vs.

5 **Dubray, Nathan Gene**

6 **Homeless, New Town, ND**

7 SSAN: [REDACTED]

8 DOB: 9-12-1985

9 Defendant.

Jason #21086
)AFFIDAVIT OF PROBABLE CAUSE

)GRAND FORKS POLICE DEPARTMENT

)ICR #: 201200059

)CHARGE: Gross Sexual Imposition

18-2012CR1960

FILED IN THE OFFICE OF
CLERK OF DISTRICT COURT
GRAND FORKS COUNTY, N. DAK. ON

AUG - 6 2012

REBECCA ABSEY, CLERK

Deputy



10 **STATE OF NORTH DAKOTA)**

11 **COUNTY OF GRAND FORKS)**

12 Comes now, Cpl. J. Moe #650, being first duly sworn, deposes and states to the Court as follows:

- 13
- 14 1) That your Affiant is a Police Officer with the Grand Forks Police Department.
- 15 2) That your Affiant has reviewed the attached investigative reports, which expressly incorporated
- 16 herein by reference, and states upon information and belief that there is probable cause to believe that a
- 17 criminal offense has been committed by the Defendant, and for the issuance of a warrant for the arrest of
- 18 the Defendant.

19 **FURTHER YOUR AFFIANT SAYETH NOT.**

20 **DATED this 15th day of March, 2012**

21 *J. Moe-650*
 22 Cpl. J. Moe, Investigating Officer

23 Subscribed and sworn to before me this 15th day of March, 2012

24 **WILLIAM J. MACKI**
 Notary Public
 State of North Dakota
 My Commission Expires Feb. 8, 2018

25 Office of State
 26 Grand Forks County
 Grand Forks, North Dakota

27 Notary Public, Grand Forks County, North Dakota
 My Commission Expires: *2/8/18*

Grand Forks Police Department

122 South Fifth Street, P.O. Box 5058, Grand Forks, ND 58206-5058
(701) 787-8000 FAX (701) 780-8253

INCIDENT SUMMARY - District Court

Grand Forks Police Department ICR #: 201200059

Date: 1-3-2012

Location: 2839 20th Ave. S. Building D

Investigating Officer's Name: Cpl. J. Moe #650

Reviewing Supervisor Name: Sgt. Macki #414

Adult Suspect's Name/DOB: Dubray, Nathan Gene/9/12/1985

Based upon the information in the below synopsis, this investigating officer believes probable cause exists that Dubray, Nathan Gene has committed the crime of Gross Sexual Imposition or other violations of law.

Synopsis

The facts present to support a charge of Gross Sexual Imposition, a AA Felony, against Nathan Dubray are:

- Juvenile female M.W., DOB 1-23-2003, reported Nathan Dubray, 26 years of age, woke her and brought her to the living room of her and her mother's residence where he "was rubbing my private" during the early morning hours of January 3, 2012.
- Juvenile female M.W. stated that Dubray "unzipped his pants" and "tried to make me lick his bottom".
- Juvenile female M.W. identified a penis as a males "bottom" by use of pictures.
- Juvenile female M.W. identified a vagina as a females "bottom" by use of pictures.
- Juvenile female M.W. stated someone knocked on the door and she began walking down the hallway to her room when Dubray wanted her to kneel in front of him. Juvenile female M.W. stated there was another knock on the door causing Dubray to put his penis back in his pants and her to go to bed.
- Checking with dispatch, Officers were sent to the residence to complete a welfare check on Dubray at approximately 0300 hours.
- Juvenile female M.W. stated she was again awakened by Dubray when the sun was up on the morning of January 3, 2012.
- Juvenile female M.W. stated Dubray again brought her to the living room and she was sitting on his lap when Dubray took his "bottom" from his pants and "made" her touch his penis with her hand. Juvenile female M.W. stated Dubray wanted her to do something with her hand and she made a back and forth motion with her hand.



Investigating Officer's Signature


Reviewing Supervisor's Signature

Grand Forks Police Department

122 South Fifth Street, P.O. Box 5058, Grand Forks, ND 58206-5058
(701) 787-8000 FAX (701) 780-8253

- Juvenile female M.W. stated that Dubray had his hand down her pants while doing this and was touching her "bottom" with his hand rubbing up and down.
- On 1-3-2012, I interviewed Dubray who stated that on 1-3-2012 he was awakened by Shelby Weist, the mother of Juvenile female M.W., yelling at him that he touched Juvenile female M.W.
- When Dubray was told of the allegation that he touched Juvenile female M.W. private area, he stated "I would never do that", but when asked why Juvenile female M.W. would say that, Dubray responded "usually a child that age, they are telling the truth".
- Dubray was told that Juvenile female M.W. stated he asked her to touch his privates, Dubray put his hands over his eyes and began to weep, stating "if I did, I'm sorry" and stated "I honestly don't know".
- Dubray stated he "blacked out" and does not remember what he did exactly but remembers going to Joe Bull's residence between 0300 and 0800 hours.
- Dubray stated "I don't know if I did or if I didn't", "if I did I don't know" when again told of the accusation by Juvenile female M.W.
- On 2-9-2012 at 0800 hours, I spoke to Tori Killscrow, who was staying at the residence of Shelby Weist on 1-3-2012, and reported that she woke in the middle of the night to Nathan Dubray attempting to "have sex" with her.
- On 2-15-2012 at approximately 1400 hours, I met with Bobby Joe Bull, who also goes by Joe Bull. Bull stated that Dubray left his residence at approximately 0200 hours to 0230 hours at which time he shut and locked the door. Bull stated that he is "pretty sure" that Dubray attempted to return but could not as the door was locked.


Investigating Officer's Signature

414

Reviewing Supervisor's Signature

DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

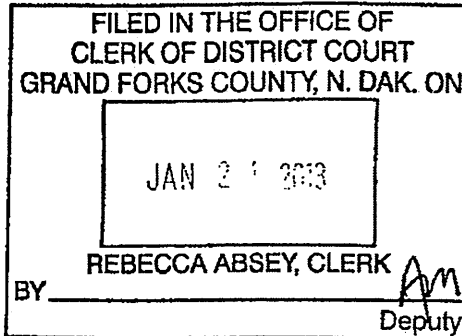
State of North Dakota,

Plaintiff,

V

Nathan Gene Dubray,

Defendant.



AMENDED INFORMATION

Court No. 18-2012-CR-01960/001, 18-2012-CR-01960/002
SA#121086

M. Jason McCarthy, ND Bar ID #05656 in and for the County of Grand Forks, in the State of North Dakota, gives this Court to understand and be informed:

COUNT I:

That between the 2nd day of January, 2012, and the 3rd day of January, 2012, within the County of Grand Forks in the State of North Dakota, one Nathan Gene Dubray did commit the crime of **GROSS SEXUAL IMPOSITION**, in violation of Sections 12.1-20-03(1)(d), 12.1-20-03(3)(a), and 12.1-32-01(1) of the North Dakota Century Code, a Class AA Felony, by then and there being an actor at least twenty two years of age and engaging in or causing another to engage in a sexual act with a victim less than fifteen years of age; To wit: That Nathan Gene Dubray, being an actor at least twenty two years of age did engage in or cause another to engage in a sexual act when the Defendant engaged in a sexual act with an 8 year old juvenile victim including but not limited to sexual contact between the Defendant's exposed penis and the victim's face and the Defendant's hand and the victim's vulva. This taking place at 2839 20th Avenue South, Building D, in Grand Forks, North Dakota.

COUNT II:

That on or about the 3rd day of January, 2012, within the County of Grand Forks in the State of North Dakota, one Nathan Gene Dubray did commit the crime of **GROSS SEXUAL IMPOSITION**, in violation of Sections 12.1-20-03(1)(d), 12.1-20-03(3)(a), and 12.1-32-01(1) of the North Dakota Century Code, a Class AA Felony, by then and there being an actor at least twenty two years of age and engaging in or causing another to engage in a sexual act with a victim less than fifteen years of age; To wit: That Nathan Gene Dubray, being an actor at least twenty two years of age, did engage in or cause another to engage in a sexual act when the Defendant engaged in a sexual act with an 8 year old juvenile victim including contact between the Defendant's exposed penis and the victim's hand and the Defendant's hand and the victim's vulva. This taking place at 2839 20th Avenue South, Building D, in Grand Forks, North Dakota.

Names of all witnesses for the prosecution known to State's Attorney at this date:

Travis Michael Benson, Grand Forks Police Department
Brett Johnson, Grand Forks Police Department




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Grand Forks County, ND

Jeremy Moe, Grand Forks Police Department
Caitlin Prelip, Grand Forks Police Department
Shawn Thompson, Grand Forks Police Department
DaLee M Wilkinson, Grand Forks Police Department
Wesley Vert III, Grand Forks Police Department
Gerald White Jr., Bureau of Indian Affairs
Bureau of Indian Affairs Personnel
Grand Forks County Social Service Center Personnel
Altru Hospital Personnel
Carrie Simonson, R.N.
Arne H. Graff, M.D.
Tammy C. Knudson LSW
Mario Alcon
Bobby Joe Bull
Tori Killscrow
Yvonne Killscrow
Juvenile M.I.W.
Shelby Joleen Weist

This contrary to the statute and against the peace and dignity of the State of North Dakota.

Dated at Grand Forks, North Dakota, this 31st day of December, 2012.



States Attorneys Office
Grand Forks County, North Dakota

IR#201200059
Ah

1 STATE OF NORTH DAKOTA IN DISTRICT COURT
2 COUNTY OF GRAND FORKS NORTHEAST CENTRAL JUDICIAL DISTRICT
3

4 State of North Dakota,)
5 Plaintiff,)
6 v.) Case No. 18-2012-CR-01960
7 Nathan Gene Dubray,)
8 Defendant.)

9
10 T R A N S C R I P T
11 of
12 P R O C E E D I N G S

13 Change of Plea July 15, 2013 10:05 A.M.
14 TAKEN AT: Grand Forks County Courthouse
Grand Forks, North Dakota
15 BEFORE: HONORABLE DEBBIE G. KLEVEN
16 -----

17 A P P E A R A N C E S

18 FOR THE STATE: M. JASON MCCARTHY
State's Attorney's Office
19 P.O. Box 5607
Grand Forks, ND 58206-5607

20 FOR THE DEFENDANT: BLAKE D. HANKEY
Attorney at Law
21 405 Bruce Ave., Ste 100
Grand Forks, ND 58201

22
23 ADAM FLEISCHMAN
Attorney at Law
24 405 Bruce Ave., Ste 100
Grand Forks, ND 58201
25

EXHIBIT

tabbies

4

Marsha Allmaras
Registered Professional Reporter
Grand Forks, North Dakota

1

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3/9/2015 3:30:05 PM
Grand Forks County, ND

1 WHEREUPON,

2 the following proceedings were had, to-wit:

3 THE COURT: This is the time set for a status
4 conference in the case captioned State of North Dakota
5 versus Nathan Dubray.

6 This microphone is not working.

7 (Pause in proceedings.)

8 THE COURT: You're able to hear me okay?

9 MR. MCCARTHY: Yes.

10 MR. HANKEY: (Nodding.)

11 THE COURT: Okay. This case is set for a jury
12 trial to commence tomorrow morning.

13 The record should reflect the State is
14 represented by Assistant State's Attorney Jason McCarthy.
15 The defendant, Nathan Dubray, is present and is
16 represented by Attorneys Blake Hankey and Adam Fleischman.

17 And do we have Dawnita Nilles present?

18 MRS. NILLES: Yes, ma'am.

19 THE COURT: And Dawnita Nilles is the
20 court-appointed guardian ad litem for the minor child in
21 this case.

22 Mr. Dubray, I show that you previously appeared
23 on this case, and you were advised of rights and penalty
24 provisions. Do you have any questions about your rights
25 in this case?

1 NATHAN DUBRAY: No, Your Honor.

2 THE COURT: Or would you like me to go through
3 those rights with you again?

4 NATHAN DUBRAY: No.

5 THE COURT: Okay. Then, as far as the jury trial
6 for tomorrow, are both sides intending to proceed to
7 trial?

8 MR. HANKEY: Your Honor, if I can. I spoke with
9 Mr. McCarthy, I guess, briefly last week. We had --

10 Nathan was able to take a train. Obviously, he
11 was always going to come to court, but the earliest he
12 could get here was this morning. I've had a chance to
13 talk with him.

14 Further discussions with him -- it's our
15 intention to do a change of pleas at this time.

16 And Mr. McCarthy gave his recommendation the
17 State would offer. We certainly know it's an open plea.
18 And, also, just for the Court's information, this will be
19 an Alford plea.

20 And there's plenty on the record, and I can
21 certainly go through it more if the Court would like as to
22 why we need to do an Alford basis on this case.

23 THE COURT: Okay. Mr. Dubray, is it your intent
24 to enter a guilty plea to these two counts today?

25 NATHAN DUBRAY: Yeah.

1 THE COURT: And, Mr. Dubray, do you understand
2 that if you enter an open guilty plea, the State is not
3 bound -- or the Court is not bound by any plea agreement?

4 NATHAN DUBRAY: Yes.

5 THE COURT: And do you understand that in this
6 case this is a class double A felony; so the maximum
7 penalty that may be imposed is anything up to life
8 imprisonment?

9 NATHAN DUBRAY: Yes.

10 THE COURT: And, then, Mr. Dubray, I do want you
11 to understand that with an open guilty plea, a life
12 imprisonment sentence could include -- I guess the Court
13 decides whether you get the opportunity for parole or not.
14 That would be the maximum, is life without parole.

15 But if I would impose a sentence of life
16 imprisonment with parole, that you do have to serve at
17 least 30 years, less any sentence reduction earned for
18 good conduct, before you could be considered for parole.
19 So that would be the absolute maximum sentence.

20 Do you understand?

21 NATHAN DUBRAY: Yes.

22 THE COURT: So either life imprisonment with or
23 without parole, but if it's with parole, you still have to
24 serve 30 years, less any good time.

25 There are minimum mandatory penalties, though,

1 that do apply in this case, and those are set forth in
2 section 12.1-20-03(3)(a).

3 On a double A felony, when the actor was at least
4 22 years of age at the time of the commission of the
5 offense and the child or the victim was under the age of
6 15, the Court must impose a minimum sentence of 20 years
7 imprisonment with probation supervision to follow the
8 incarceration, unless the Court finds that the sentence
9 would impose a manifest injustice as defined by North
10 Dakota law and that you have accepted responsibility for
11 the crime or cooperated with law enforcement.

12 So if you do plead guilty, that would be
13 accepting responsibility, and it would allow the Court to
14 deviate if -- from the 20-year sentence if it would impose
15 a manifest injustice, but you would still have to serve at
16 least five years.

17 Do you understand that --

18 NATHAN DUBRAY: Yes.

19 THE COURT: -- Mr. Dubray? Okay. Then,
20 Mr. Dubray, at this time I'm going to ask you for your
21 plea on each count.

22 Count 1 alleges that between January 2nd and
23 January 3rd of 2012, you were at least 22 years of age and
24 you did engage in or cause another to engage in a sexual
25 act when the -- when you engaged in the sexual act, the

1 victim in this case was an eight year old, and it included
2 sexual contact between your exposed penis and the victim's
3 face and your hand and the victim's vulva.

4 This taking place at 2839 20th Avenue South,
5 Building D, in Grand Forks, North Dakota. Again, a Class
6 double A felony.

7 Your plea to the charge, Mr. Dubray?

8 MR. HANKEY: I guess maybe I had given him the
9 wrong information, but we were basing the Alford basis --
10 we were admitting there was enough facts, that, you know,
11 if we went forward, that a jury would convict Mr. Dubray.

12 So I just wanted to clarify that. I think that's
13 the question that Nathan had. It's on the Alford basis.

14 THE COURT: Okay. But your plea to the charge?

15 NATHAN DUBRAY: Guilty.

16 THE COURT: Okay. Count 2 is the allegation that
17 on January 3rd of 2012, you were at least 22 years of age,
18 and you did engage in a sexual act with an eight-year-old
19 juvenile, including contact between the defendant's
20 exposed penis and the victim's hand and the defendant's
21 hand and the victim's vulva.

22 This taking place at 2839 20th Avenue South,
23 Building D, in Grand Forks, North Dakota. Also a Class
24 double A felony.

25 Your plea to the charge?

1 NATHAN DUBRAY: Guilty.

2 THE COURT: Mr. Dubray, are your pleas of guilty
3 to these charges made freely and voluntarily?

4 NATHAN DUBRAY: Yes.

5 THE COURT: Have there been any threats or
6 promises made to you in order to get you to plead guilty?

7 NATHAN DUBRAY: No.

8 THE COURT: Do you understand by pleading guilty
9 you are giving up your right to have a trial on the
10 charges?

11 NATHAN DUBRAY: Yes.

12 THE COURT: And do you understand that we are
13 prepared to proceed to jury trial tomorrow and that we
14 have summoned, I believe, over 60 jurors in for this case
15 and had them complete questionnaires. So we're ready to
16 go. Do you understand that?

17 NATHAN DUBRAY: Yes.

18 THE COURT: And do you understand that by
19 pleading guilty you are waiving your right to a jury
20 trial?

21 NATHAN DUBRAY: Yes.

22 THE COURT: And you're waiving your right to face
23 the witnesses the State may have against you?

24 NATHAN DUBRAY: Yes.

25 THE COURT: And to call any witnesses in your own

1 behalf?

2 NATHAN DUBRAY: Yes.

3 THE COURT: And do you understand the only other
4 proceedings that will take place in this case will be
5 sentencing?

6 NATHAN DUBRAY: Yes.

7 THE COURT: And, Mr. Dubray, since this is an
8 open guilty plea, again, I'll consider any recommendations
9 from counsel. Also, I'll consider the presentence
10 investigation report and any statements that you make.

11 But I do have to impose a sentence of at least
12 five years, and it can be anything up to life imprisonment
13 without parole. You understand that?

14 NATHAN DUBRAY: Yes.

15 THE COURT: And, Mr. Dubray, do you feel you've
16 had sufficient time to discuss this case with your
17 attorneys?

18 NATHAN DUBRAY: Yes.

19 THE COURT: And are you satisfied with the
20 representation that you have received from your attorneys?

21 NATHAN DUBRAY: Yes.

22 THE COURT: And, Mr. Dubray, are you under the
23 influence of any alcohol or drugs at this time?

24 NATHAN DUBRAY: No.

25 THE COURT: And, Mr. Dubray, do you take any

1 prescription medication?

2 NATHAN DUBRAY: No.

3 THE COURT: And when was the last time you
4 consumed any alcohol?

5 NATHAN DUBRAY: A month ago.

6 THE COURT: Okay. So you haven't had any in the
7 last 24 hours?

8 NATHAN DUBRAY: No, ma'am.

9 THE COURT: Nor have you taken any medication
10 prescription -- or something that's prescribed, or
11 something that wasn't prescribed but it's still a
12 prescription medication?

13 NATHAN DUBRAY: No.

14 THE COURT: Okay. Then, I'm going to ask the
15 State for the factual basis, and then I'm going to hear
16 from your attorney as to the reason for the Alford plea.

17 And, Mr. Dubray, do you understand an Alford plea
18 means that you don't really remember what happened, but
19 you're satisfied that there are enough facts that you
20 could be proven that -- facts that can be proven that
21 would convict you of this offense?

22 NATHAN DUBRAY: Yes.

23 THE COURT: Okay. Mr. McCarthy.

24 MR. MCCARTHY: Thank you, Your Honor. On
25 January 3rd of 2012, juvenile female M.W., date of birth,

1 XXX [REDACTED] of 2003, reported that Mr. Dubray,
2 26 years of age, woke her up and brought her to the living
3 room of her and her mother's residence, where he rubbed
4 her private during the early morning hours of January 3rd
5 of 2012. This residence, Your Honor, was an apartment
6 here in the City of Grand Forks in Grand Forks County.

7 She reported that Mr. Dubray unzipped his pants
8 and tried to make him (sic) lick his bottom. She,
9 subsequently, through the use of pictures through the
10 Children's Advocacy Center and, subsequently, in speaking
11 with Dr. Graff, identified a penis as a male's bottom.
12 She also indicated that she identified a vagina as a
13 female's bottom by the use of pictures.

14 She stated that during their first encounter,
15 someone knocked on the door, and she began walking down
16 the hallway to her room when Dubray wanted her to kneel in
17 front of him. She stated there was another knock on the
18 door, causing Dubray to put his penis back in his pants
19 and her to go to bed.

20 Law enforcement did check with dispatch, Your
21 Honor, and learned that officers were sent to that
22 apartment to complete a welfare check on Dubray at
23 approximately 3:00 o'clock that morning.

24 The female stated she was again awakened by
25 Dubray, this time after the sun came up the morning of

1 January 3rd of 2012. She stated that he brought her into
2 the living room, and she was sitting on his lap when Mr.
3 Dubray took his bottom from his pants and made her touch
4 his penis with her hand.

5 She stated that he wanted her to do something
6 with her hand, and she made a -- described it as a
7 back-and-forth motion during her Children's Advocacy
8 Center interview. She stated that Mr. Dubray did have his
9 hand down her pants while doing this and was touching her
10 bottom or her vaginal area with his hand rubbing up and
11 down.

12 Mr. Dubray was interviewed the afternoon of
13 January 3rd of 2012 by Detective Moe. He indicated that
14 that -- late that morning he was awakened by the juvenile
15 female's mother yelling at him and telling him that he had
16 touched juvenile female. When Dubray was told of the
17 allegation that he touched the juvenile female's private
18 area, he stated, "I would never do that."

19 Detective Moe asked why the juvenile female would
20 say that or make it up. Dubray's response was, "Usually
21 with a child that age, they are telling the truth."

22 Dubray was told by Detective Moe that juvenile
23 female stated he asked her to touch his privates. Dubray
24 put his hands over his eyes and began to weep, stating,
25 "If I did, I'm sorry," and stated, "I honestly don't

1 know."

2 He stated that he blacked out and doesn't
3 remember what exactly he did but does remember going to
4 Joe Bull's residence somewhere between 3:00 and 8:00 in
5 the morning.

6 Dubray stated, "I don't know if I did or if I
7 didn't. If I did, I don't know," when again told of the
8 accusation.

9 Our investigation revealed, Your Honor, that
10 Mr. Dubray told Detective Moe that he had been drinking UV
11 Vodka that evening, smoking marijuana, and we're aware of
12 at least him drinking one Budweiser beer.

13 THE COURT: Mr. Dubray, do you agree with these
14 facts?

15 NATHAN DUBRAY: Yes.

16 THE COURT: And, Mr. Hankey, do you wish to state
17 anything with respect to the plea and the Alford plea?

18 MR. HANKEY: Well, Your Honor, I think
19 Mr. McCarthy basically covered what I was going to say.
20 There was, at the very least, a half of a pint of UV Vodka
21 drank, admission of marijuana usage, and admission of
22 drinking at least one Budweiser.

23 And throughout his whole initial interview on
24 January 3rd of 2012, he does say that, you know, "I don't
25 know. I don't think that happened." Goes on to say that

1 he was blacked out. Goes on to say that "I don't know if
2 I did or if I didn't. I don't know."

3 And Mr. Dubray has been very consistent with me
4 in our office as to the same statements that he made back
5 on January 3rd of 2012.

6 And that's been the hang-up and why we are on the
7 eve of trial and are now just changing the pleas. He does
8 now admit, given the facts and as outlined, that there's
9 enough here on an Alford basis, but he has no recollection
10 of doing this act. The reason he's having so much trouble
11 and is so emotional right now is it's not his character.
12 It's not how he's made up.

13 And although a lengthy sentencing, we would ask
14 for and present our case on that. But that is why he's
15 having such a hard time is he really has no recollection,
16 no history of anything like this. And that's why we're
17 using an Alford basis. He really has no recollection.

18 THE COURT: And, Mr. Dubray, do you admit that
19 you were under the influence of alcohol and other
20 substances to the point that you don't recall what
21 happened on January -- let me see. I forgot the dates
22 here.

23 MR. MCCARTHY: 2nd and 3rd, Your Honor.

24 THE COURT: January 2nd and 3rd; is that correct,
25 Mr. Dubray?

1 NATHAN DUBRAY: Yes.

2 THE COURT: Where had you been earlier that day?

3 NATHAN DUBRAY: Trying to get money so I can get
4 alcohol.

5 THE COURT: Okay. The Court finds the
6 defendant's guilty plea is made freely and voluntarily and
7 that a factual basis exists for the plea.

8 What we'll do is we will order a presentence
9 investigation. That will require that Mr. Dubray complete
10 a psychological assessment through Northeast Human Service
11 Center, and it's going to take a little while to get all
12 that completed.

13 Mr. Dubray, where are you living at this time?

14 NATHAN DUBRAY: I was staying with a friend in
15 Minnesota, but I came back here because I had -- well,
16 because of all this.

17 MR. HANKEY: Just so the Court knows, he's
18 currently in a treatment program in Minnesota right now
19 for alcohol.

20 THE COURT: Okay.

21 MR. HANKEY: Where is it again?

22 NATHAN DUBRAY: It's in Goodhue County in Red
23 Wing, Minnesota.

24 MR. HANKEY: He's living in Red Wing, Minnesota.
25 It's Goodhue County, and that's where he's in the

1 treatment program.

2 THE COURT: What's the name of the treatment
3 program?

4 NATHAN DUBRAY: It's just like outpatient group
5 that meets up at the armory every Tuesday and Thursday. I
6 forgot the name of it, but it's through Goodhue's County
7 Social Services.

8 THE COURT: You said what county again?

9 MR. HANKEY: Goodhue.

10 THE COURT: Goodhue? Where are you from
11 originally?

12 NATHAN DUBRAY: Fort Berthold.

13 THE COURT: So you took a bus to get here?

14 NATHAN DUBRAY: I took a train, Your Honor.

15 THE COURT: Mr. Dubray, I show that you've posted
16 a \$50,000 surety bond through a bonding agency.

17 NATHAN DUBRAY: Yes, Your Honor.

18 THE COURT: Did someone help you post that money?

19 NATHAN DUBRAY: Yes, Your Honor.

20 THE COURT: And who did that?

21 NATHAN DUBRAY: My father-in-law.

22 THE COURT: Your father-in-law?

23 NATHAN DUBRAY: Yes, Your Honor.

24 THE COURT: Okay. So I assume you're married,
25 then?

1 NATHAN DUBRAY: Yes.

2 THE COURT: And where does your spouse reside?

3 NATHAN DUBRAY: Here in Grand Forks.

4 THE COURT: Will you be staying with her now? Or
5 do you have children?

6 NATHAN DUBRAY: We have children.

7 THE COURT: Okay. I assume, then, you're not to
8 be residing there.

9 NATHAN DUBRAY: It's up to her, honestly.

10 THE COURT: Is that what Social Services says?

11 NATHAN DUBRAY: Yeah.

12 THE COURT: What is the State's position with
13 respect to bond?

14 MR. MCCARTHY: We discussed this, Your Honor, and
15 I indicated to Mr. Hankey we wouldn't seek an adjustment
16 on bond. We don't have any reports that he's violated the
17 no contact order.

18 I think there may be some open warrants out of
19 Bismarck on some misdemeanor-type sentencing issues like
20 community service or that type of thing. So I'm not sure
21 how he wants to -- I think he's got to appear on them
22 also.

23 THE COURT: Okay. So, Mr. Dubray, is it your
24 intention to return to the treatment center?

25 NATHAN DUBRAY: Yes.

1 THE COURT: And you'll be living with your
2 friend?

3 NATHAN DUBRAY: Yes.

4 THE COURT: What's your friend's name?

5 NATHAN DUBRAY: Austin Owen. (Phonetic)

6 THE COURT: Austin Owen?

7 NATHAN DUBRAY: Yes, ma'am.

8 THE COURT: Does Mr. Dobmeier have you call in
9 once a week?

10 NATHAN DUBRAY: Yes.

11 THE COURT: And you've made all those calls?

12 NATHAN DUBRAY: Yeah, every Monday.

13 THE COURT: And, Mr. Hankey, I'm not aware that
14 you've had any trouble keeping in touch with Mr. Dubray.

15 MR. HANKEY: No. In fact, he even has
16 Mr. Fleischman's cell phone number, and they text
17 sometimes too; so there's been no issues with our office.

18 THE COURT: Okay. Mr. Dubray, I'm going to
19 continue bond. We'll give you a sentencing date here.

20 MR. HANKEY: Just for the Court's information, we
21 do plan on, as part of our recommendation, getting
22 Dr. Benson to come up and testify and doing -- I know the
23 State is going to do an evaluation. We were going to get,
24 I guess, maybe another evaluation from Dr. Benson.

25 And I know there's going to be multiple witnesses

1 Mr. Dubray would like to call. And so maybe a half day,
2 if we could get that, and just so we have plenty of time.
3 I don't know if the State is going to be having any
4 witnesses testify and -- or at least maybe two hours.

5 And if we could get some time to get the
6 evaluation from Dr. Benson completed, and then give her
7 time to get up here to testify. That would be what we had
8 planned on presenting at sentencing.

9 THE COURT: How about October 4th, the morning?
10 We could set it at 9:00.

11 MR. MCCARTHY: That works for the State, Your
12 Honor.

13 MR. HANKEY: Yes, that would be fine, Your Honor.

14 THE COURT: Okay. What I will need is Mr. Dubray
15 to go to the Parole and Probation office today so they can
16 make arrangements for that presentence investigation.
17 Also that psychological evaluation should be scheduled
18 through Northeast before he leaves town, because he'll
19 have to make arrangements to get back here for that.

20 MR. HANKEY: Okay. We'll make sure that gets
21 done today, Your Honor.

22 THE COURT: Okay. And, then, obviously it takes
23 a while to get all those reports done. So maybe you can
24 go ahead and start working with Dr. Benson to get that all
25 arranged.

1 MR. HANKEY: Okay. Will do.

2 THE COURT: Does the State have anything further
3 at this time?

4 MR. MCCARTHY: No, Your Honor. Thank you.

5 THE COURT: Or Mr. Hankey?

6 MR. HANKEY: No, Your Honor. Thank you.

7 THE COURT: Okay. And, then, Mr. Dubray, just so
8 you know, I have accepted the guilty plea; so we'll call
9 off the jury, and it means you can't decide at
10 5:00 o'clock today you want to go to a trial. Okay? It's
11 done now. You understand that?

12 NATHAN DUBRAY: Yes, Your Honor.

13 THE COURT: Any questions at all about that?

14 NATHAN DUBRAY: No, ma'am.

15 THE COURT: Okay. Then, we will see everyone
16 October 4th at 9:00 a.m. Thank you.

17 MR. MCCARTHY: Thanks, Judge.

18 (The proceedings were concluded at 10:31 a.m.)
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State of North Dakota
Grand Forks County

District Court
Northeast Central Judicial District

State of North Dakota vs. Nathan G Dubray

Count: 1 Amended Criminal Judgment

Count: 2 Criminal Judgment

Case Number: 18-2012-CR-01960

CURRENT DEFENDANT INFORMATION	
Known Address: 314 State St Grand Forks, ND 58201	Correspondence Address: 314 State St Grand Forks, ND 58201
DOB: 09/12/1985	

CASE CHARGES				Amended	FILED IN THE OFFICE OF CLERK OF DISTRICT COURT GRAND FORKS COUNTY, N. DAK. ON JAN - 3 2014 REBECCA ABSEY, CLERK BY <i>Am</i> Deputy
Ct	Statute	Description	Degree		
1	12.1-20-03	Gross Sexual Imposition	Felony AA		
2	12.1-20-03	Gross Sexual Imposition	Felony AA		

TERMS OF DISPOSITION: COUNT 1

Disposition Date: 10/04/2013

Offense Information:

Ct	Statute	Description	Degree	Offense Disposition
1	12.1-20-03	Gross Sexual Imposition	Felony AA	Pled Guilty

Disposition Details:

Commitments:

Committed to: Department of Corrections and Rehabilitation
Term: 30 years
Suspended: 15 years
Probation: 10 years

Fees:

Criminal Administration Fee	\$900.00	Waived
Defense/Facility Admin Fee	\$100.00	Waived

Order of the Court and Conditions:

Defendant is placed under the following conditions:

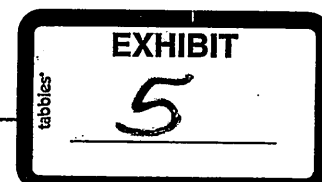
Conditions of Probation	Location	End Date	Comment
Notify Court of Address Change			
Violate No Criminal Laws			
Restitution			Restitution in the amount of \$5,265.53 at this time, with restitution being left open through the period of supervised probation, to be paid in full prior to the expiration of supervised probation.

Additional Conditions and Order of the Court.

Credit for time served from September 25, 2012 through October 9, 2012.

No contact with the victim or family members.

Defendant will successfully complete the sex offender treatment program before being released.



Defendant is placed on supervised probation for a period of 10 years from the later of the following dates: (a) the order imposing probation; (b) release from incarceration; or, (c) termination of Defendant's parole. The Defendant will report to a Parole/Probation Officer with the Parole and Probation Division of the North Dakota Department of Corrections and Rehabilitation. The probationary conditions are either set forth below or in an attached Appendix A or Certificate to this Criminal Judgment.

TERMS OF DISPOSITION: COUNT 2

Disposition Date: 10/04/2013

Offense Information:

Ct	Statute	Description	Degree	Offense Disposition
2	12.1-20-03	Gross Sexual Imposition	Felony AA	Pled Guilty

Disposition Details:

Commitments:

Committed to: Department of Corrections and Rehabilitation

Term: 30 years

Suspended: 15 years

Probation: 10 years

Concurrent with Case #: Count 1

Fees:

Order of the Court and Conditions:

Defendant is placed under the following conditions:

Conditions of Probation	Location	End Date	Comment
Notify Court of Address Change			
Violate No Criminal Laws			

Additional Conditions and Order of the Court.

Credit for time served from September 25, 2012 through October 9, 2012.

No contact with the victim or family members.

Defendant will successfully complete the sex offender treatment program before being released.

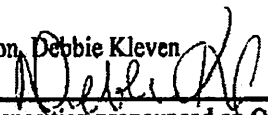
Defendant is placed on supervised probation for a period of 10 years from the later of the following dates: (a) the order imposing probation; (b) release from incarceration; or, (c) termination of Defendant's parole. The Defendant will report to a Parole/Probation Officer with the Parole and Probation Division of the North Dakota Department of Corrections and Rehabilitation. The probationary conditions are either set forth below or in an attached Appendix A or Certificate to this Criminal Judgment.

Total amount owed:

Assessed	Waived	Suspended	Total
\$1,000.00	\$1,000.00	\$0.00	\$0.00

Hon. Debbie Kleven

Defendant's Signature


Disposition pronounced on October 04, 2013 by District Court Judge

Clerk of Court: Rebecca Absey

701-787-2700

Date

If you have questions regarding the terms of your disposition, please contact your attorney, your probation agent or Clerk of Court's Office. All payments to be made to the Clerk of Court at: Grand Forks County District Court, 124 S. 4TH STREET, PO BOX 5979, GRAND FORKS, ND 58206.

The Clerk of District Court's Office accepts Visa, MasterCard, or Discover Cards in person or via telephone. Payments can also be made online at <http://www.ndcourts.gov/publicsearch>



JUDGMENT AND COMMITMENT CONDITIONS
NORTH DAKOTA DEPARTMENT OF CORRECTIONS AND REHABILITATION
FIELD SERVICES DIVISION
SFN 14671 (Rev. 6-13)

**RECOMMENDED CONDITIONS FOR SENTENCE TO PROBATION,
DEFERRED OR SUSPENDED SENTENCE IN THE CASE OF**

State of North Dakota v. Nathan G. Dubray

Criminal Case No. 18-2012-CR-01960 – Grand Forks County

By Order of the Court:

1. It is a violation of probation for you to violate any federal, tribal, state, county or municipal criminal law or ordinance during the period of probation.
2. It is a violation of probation for you to own, purchase, borrow, possess, use or carry any type of firearm, destructive device or dangerous weapon while on probation.
3. It is a violation of probation for you to willfully defraud a urine test administered as a condition of probation.
4. You shall continue your present employment or seek and maintain suitable employment; you may pursue a vocational or educational course of study that will lead to future or better employment.
5. It is a violation of probation for you to use or possess any alcoholic beverage, or to enter any liquor, beer or wine establishment during the period of time you are under probation supervision, unless otherwise authorized by your parole/probation officer.
6. It is a violation of probation for you to use or possess any non-prescribed controlled substances while on probation supervision. It is a violation of probation to knowingly associate with users or traffickers in narcotics, marijuana, or other controlled substances.
7. You are not to associate with any known felons without prior permission from your parole/probation officer.
8. It is a violation of probation for you to possess or use any type of surveillance equipment such as audio, video, and motion detectors, scanners or any type of surveillance or counter surveillance equipment without prior written permission from your parole/probation officer.
9. You shall inform your parole/probation officer in the manner that they direct of any changes in your place of residence and employment, and other pertinent activities. You shall answer truthfully all reasonable inquiries by the parole/probation officer and report to them as directed. This information must be furnished to the parole/probation officer by written report, telephone, or a personal visit to their office. Your parole/probation officer may visit your residence or place of employment at reasonable hours. You shall report within twenty-four hours to the **Grand Forks Parole/Probation Office, 311 South 4th Street, #101, Grand Forks, ND 58201, (701) 795-3873.**

10. You shall submit your person, place of residence and vehicle, or any other property to which you may have access, to search and seizure at any time of day or night by a parole/probation officer, with or without a search warrant.
11. You shall not leave the State of North Dakota without prior permission from your probation officer.
12. You shall waive extradition to the State of North Dakota from any jurisdiction in or outside the United States where you may be found, and you also agree not to contest any effort by any jurisdiction to return you to the State of North Dakota while this probation is in effect.
13. You shall support your dependents.
14. You shall regularly attend weekly self-help groups such as Alcoholic Anonymous/Narcotics Anonymous, Sex Addicts Anonymous, Sexaholics Anonymous as recommended by your probation officer.
15. You shall submit to a medical examination or other reasonable testing to include breath, blood, saliva, or urine samples for the purpose of determining the use of alcohol or controlled substances whenever requested by any parole/probation officer. It is a violation of probation for you to use any adulterants that may affect the results of a breath, blood, saliva or urine test.
16. You shall receive a chemical dependency/addiction evaluation and comply with all treatment recommendations, subject to your right to a hearing before the court if you disagree with any treatment recommendation.
 - a. You shall pay restitution in an initial amount to be determined with 90 days plus restitution for any ongoing treatment or therapy for the minor victim.
17. You shall pay a supervision fee in the amount of \$55.00 each month to the Division of Field Services, as required by N.D.C.C. § 12.1-32-07 (2).
18. You shall pay the amount of \$50.00 to the North Dakota Division of Parole and Probation, also known as the Division of Field Services, as required by N.D.C.C § 12.1-32-02 (10) and (11), for preparation of the pre-sentence investigation report.
19. You shall undergo various agreed-to community constraints as intermediate measures of the Department of Corrections and Rehabilitation to avoid revocation under N.D.C.C § 12.1-32-07 (3).
20. You shall submit to fingerprinting at the direction of your parole/probation officer.
21. It is a violation of your probation for you to telephone or write to the victim(s) or her family members, or contact the victim(s) or her family members through third parties or be within 100 yards of the victim(s) and her family members without written permission of your parole/probation officer.
22. It is a violation of your probation for you to enter onto the premises, travel past, or loiter near where the victim(s) or her family members reside without written permission of your parole/probation officer.

23. You shall provide a sample of blood or other body fluid for DNA law enforcement identification purposes and inclusion in law enforcement identification databases as required by N.D.C.C. ch. 31-13. You shall pay the cost of the collection and processing of the DNA sample.
24. You shall attend, participate in, and successfully complete a cognitive restructuring program at the request of your probation officer.
25. You shall submit to placement on an electronic surveillance system, including Global Positioning System (GPS), Electronic Monitoring Surveillance (EMS), or if it is a condition of your probation supervision that you not consume alcohol, Alcohol Monitoring Surveillance (AMS). It is a violation of this condition to tamper with, damage, destroy, or remove any GPS, EMS, or AMS equipment, including transmitters, bracelets, modems, cellular phones, cables, or other peripheral and supporting equipment, or to fail to be within the range of the GPS, EMS, or AMS Equipment for monitoring, reporting or surveillance purposes. You shall be responsible for reimbursement to the ND DOCR for the actual cost of replacement of any tampered with, damaged, destroyed, or lost or misplaced GPS, EMS, or AMS Equipment.

The Following are Sex Offender Conditions:

26. You shall attend, participate in, cooperate with and successfully follow and complete all sex offender treatment program rules and requirements and admit responsibility for your offense(s) as part of the treatment requirements. You shall attend aftercare if recommended by the parole/probation officer or treatment staff.
27. You shall register your residential address, employment or school in accordance with NDCC Section 12.1-32-15 with the law enforcement in the county or city of your intended residence as a sex offender or a felony offender against children within three (3) days of the date of the criminal judgment or your release from physical custody. If you change your name, school, residential address or employment, you shall inform the law enforcement agency with whom you are registered within ten (10) days before the change. If you change your school, residential address, or place of employment, you shall also register at the law enforcement agency having jurisdiction of the new place of residence, school, or employment within three (3) days after the change. If you change your name, vehicle information, email address, or online name, you must notify the registering law enforcement agency within three (3) days of the effective date of that change.
28. You shall not initiate, establish or maintain contact, directly or indirectly, with any child under the age of 18, or attempt to do so, except under circumstances approved in advance and in writing by your parole/probation officer.
29. You may only reside at a place of residence approved by your parole/probation officer. You may not move from your place of residence or sleep elsewhere overnight without your parole/probation officer's knowledge and permission and those with whom you reside must know that you are a sex offender.

30. You shall maintain employment at only such places as are approved by your parole/probation officer. It is a violation of probation for you to work outside the State of North Dakota or leave the State of North Dakota without permission under the Interstate Compact for the Supervision of Adult Offenders.
31. It is a violation of your probation for you to go to or loiter near schoolyards, parks, playgrounds, arcades, or other places primarily used or visited by minors.
32. It is a violation of your probation for you to obtain employment with any agency or place of business that provides services for the care or custody of minors and you may not operate a business that provides such services without written permission of your parole/probation officer.
33. It is a violation of your probation for you to purchase, possess, or use sexually stimulating materials of any kind or to use 900 telephone numbers.
34. It is a violation of your probation for you to subscribe to any Internet service provider, by modem, LAN, DSL or any other manner. You may not use another person's Internet or use Internet through any commercial venue until and unless approved in writing by your parole/probation officer.
35. It is a violation of your probation for you to possess children's items, including, but not limited to, children's clothing, toys, games, pictures and books, without written permission from your parole/probation officer.
36. It is a violation of your probation for you to date or socialize with anybody who has children under the age of 18 without written permission of your parole/probation officer.
37. You shall notify your parole/probation officer of any new and existing romantic or sexual relationships in which you may be involved.
38. You shall submit to any program of psychiatric, psychological or physiological assessment approved by the court.
39. You shall be financially responsible for all costs related to assessments, polygraphs and any treatment programming ordered by the court.

Dated: October 4, 2013

By the Court,




Debbie Kleven
District Judge

The above conditions of probation have been read and explained to me and I fully understand each one. I shall follow the conditions that the Court has listed or checked; and I understand that failure to follow any one or more of those conditions may result in a revocation of probation and that the Court may re-sentence me to any sentence

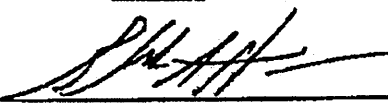
that was available to the Court at the time of the initial sentencing. I acknowledge receipt of a copy of the Judgment.

Dated this 4 day of October, 2013


Probationer

The probation conditions have been read and explained to my client by the Court. I attest that my client has stated that he/she understands each one of the court ordered probation conditions.

Dated this 4 day of October, 2013


Defense Attorney

Original to Court file

- ☐ 1 Certified copy to Warden/Superintendent of NDSP, TRCU, MRCC – If imprisonment is ordered
- ☐ 1 Certified copy to Sheriff/Jail Administrator – If county imprisonment is ordered
- ☐ 1 Copy to Defendant
- ☐ 1 Copy to State's Attorney
- ☐ 1 Copy to Local Probation Officer – If on supervised probation

State of North Dakota,)
)
 Plaintiff,)
)
 v.) Case No. 18-2012-CR-01960
)
 Nathan Gene Dubray,)
)
 Defendant.)

T R A N S C R I P T

of

P R O C E E D I N G S

Sentencing October 4, 2013 9:12 A.M.

TAKEN AT: Grand Forks County Courthouse
Grand Forks, North Dakota

BEFORE: HONORABLE DEBBIE G. KLEVEN

A P P E A R A N C E S

FOR THE STATE: MEREDITH LARSON
State's Attorney's Office
P.O. Box 5607
Grand Forks, ND 58206-5607

FOR THE DEFENDANT: BLAKE D. HANKEY
 Attorney at Law
 405 Bruce Ave., Ste 100
 Grand Forks, ND 58201

ADAM FLEISCHMAN
Attorney at Law
405 Bruce Ave., Ste 100
Grand Forks, ND 58201

EXHIBIT

6

Marsha Allmaras
Registered Professional Reporter
Grand Forks, North Dakota

1 WHEREUPON,

2 the following proceedings were had, to-wit:

3 THE COURT: We'll go ahead and go on the record
4 in the case of State of North Dakota versus Nathan Dubray,
5 Case No. 18-2012-CR-1960. The record should reflect the
6 State is represented by Assistant State's Attorney
7 Meredith Larson, and Mr. Dubray is present and is
8 represented by Attorney Adam Fleischman.

9 And I believe we have the mother of the victim
10 participating by phone. And can I just have you state
11 your name, ma'am.

12 MS. W. [REDACTED]: S.W. [REDACTED].

13 THE COURT: Okay. And, Ms. W. [REDACTED], I know that
14 we're -- I believe the State had asked that you
15 participate by phone, and so I don't know if they'll be
16 calling on you to make a statement of any kind.

17 So I'll just ask that if you can't hear anyone,
18 to just indicate so. Everybody that speaks will need to
19 speak directly into the microphone so that she should be
20 able to hear us. Okay?

21 MS. W. [REDACTED]: Okay.

22 THE COURT: I just have one more matter to take
23 care of here first.

24 (Pause in proceedings.)

25 Okay. Is the State ready to proceed to

1 sentencing in this matter?

2 MS. LARSON: I am, Your Honor. And just for the
3 record, if I could also note that the guardian ad litem is
4 here today.

5 THE COURT: Thank you.

6 MS. LARSON: And so is the stepmother of the
7 victim.

8 THE COURT: Okay.

9 MS. LARSON: As well as the crime victim witness
10 advocate, Peggy love.

11 THE COURT: Thank you. I should have noted that.
12 I appreciate that.

13 And, Mr. Hankey, are you ready to proceed?

14 MR. HANKEY: We're not, Your Honor. I spoke with
15 Mr. Dubray this morning, and he informed me that he wanted
16 to withdraw the pleas that he had entered back in July.

17 I've looked at the rule. It looks like
18 11(d)(B)(ii) covers, I guess, what he's asking for.

19 I believe that the Court has accepted his plea,
20 but he hasn't been sentenced; so he would need to show a
21 fair and just reason for the withdrawal.

22 And I guess that's kind of what his wishes are
23 and where he is -- where he is at as far as being prepared
24 for sentencing today.

25 I guess I've reviewed the PSI. Mr. Dubray has

1 reviewed the PSI. I planned on going forward today, but
2 like I said, Mr. Dubray informed me that he was wanting to
3 withdraw his plea. We pulled the rule, and I believe what
4 we'd need to do is set it on for, I guess, a briefing
5 schedule.

6 THE COURT: Okay. Ms. Larson, do you have any
7 comment?

8 MS. LARSON: Other than the State will be
9 objecting to that, Your Honor. And I would like to
10 address the matter of bond as well.

11 THE COURT: Okay. You know, it's my intent --
12 and I'm well aware of the rule and the case of State
13 versus Kevin Moore that affirmed a decision of mine in
14 2005 or '06, I believe.

15 I will -- I'm going to proceed to sentencing
16 today. I think that we owe that to the victim to bring
17 this to an end, because it's just drug out.

18 The defendant can file the motion, brief it,
19 attach affidavits, and we'll consider it, but that will
20 give the State a chance to respond.

21 But it is my intent to just proceed to sentencing
22 today to address the matter, and, then, if I would allow
23 him to withdraw his guilty plea -- but checking my notes
24 here, there was a factual basis established back on
25 July 15th, open guilty plea to both counts. I determined

1 the plea was made freely and voluntarily.

2 So I guess if he can show why a fair and just
3 reason for the withdrawal at a later time, I'll allow him
4 to, but we'll proceed to sentencing.

5 MR. HANKEY: Okay. And if I could address one
6 thing, and maybe we just need to have a quick hearing
7 before we get to the sentencing. Mr. Dubray indicated,
8 when I asked him that question this morning, that he had
9 felt pressured by Mr. Fleischman and myself to go forward.

10 And so I don't know that I feel -- unless we
11 address that issue first, that I feel comfortable
12 proceeding to sentencing, if the grounds for his
13 withdrawal are the fact that Mr. Fleischman and I had
14 somehow pressured him into entering the plea, and then I
15 go forward with the sentencing.

16 So maybe we could just try to address that issue,
17 I guess, before we proceed to sentencing.

18 THE COURT: Okay.

19 MR. HANKEY: I don't know if the Court
20 understands the predicament that I have but...

21 THE COURT: Mr. Dubray, you clearly told me you
22 made this decision freely and voluntarily.

23 NATHAN DUBRAY: Yes, ma'am.

24 THE COURT: You told me nobody made any threats
25 or promises to you.

1 NATHAN DUBRAY: Nobody did.

2 THE COURT: Okay. So, then, what's the issue?

3 NATHAN DUBRAY: I feel I owe an explanation to my
4 children; so I want to take it to trial to prove to them
5 that I didn't do this.

6 THE COURT: Okay. State have any further
7 response?

8 MS. LARSON: No, Your Honor.

9 THE COURT: I'm going to deny the request. We're
10 proceeding today. I think your attorneys are quite
11 capable of arguing what the appropriate sentence is, and
12 when we're done with this, you can file whatever motion
13 you want.

14 But the victim does deserve some conclusion to
15 this case. And I'm thinking at the time of the offense
16 the victim was eight years old. And we've already been
17 waiting since July 15th to bring this to a conclusion.

18 Part of the issue here was there was going to be
19 an independent psychological evaluation done, and you
20 didn't show up at Dr. Benson's office; correct?

21 NATHAN DUBRAY: Yeah, but they had told me that
22 that was, you know, not, like -- as -- I can't think of
23 the word, but they said that --

24 MS. W. [REDACTED]: Your Honor, I can't hear him.

25 THE COURT: Oh. Okay. I'm sorry. Go ahead.

1 You'll need to speak directly -- pull that right up to
2 you, Mr. Dubray.

3 Okay. What was the issue with the --
4 Dr. Benson's office?

5 NATHAN DUBRAY: I thought I only had to make the
6 appointment with Andy in Fargo. I didn't know it was
7 mandatory for me to meet with Dr. Benson.

8 THE COURT: Well, it wasn't. I thought that was
9 your request. It isn't mandatory. So I just thought
10 that's what you wanted to do.

11 NATHAN DUBRAY: Well, I had met with Andy first
12 and --

13 THE COURT: Okay.

14 NATHAN DUBRAY: -- I thought it was the same
15 thing.

16 THE COURT: Okay. I just thought you wanted your
17 own independent evaluation. But I'm -- we do have the
18 evaluation we need. Okay. So you don't have to go to
19 Dr. Benson or another person. I just thought you had
20 requested that.

21 NATHAN DUBRAY: I understand.

22 THE COURT: Okay. We're going to go ahead and
23 proceed to sentencing today.

24 And I will ask, Mr. Dubray, have you had a chance
25 to go through this presentence investigation with your

1 attorney?

2 NATHAN DUBRAY: Yes, Your Honor.

3 THE COURT: And have -- I'll need you to use the
4 microphone.

5 NATHAN DUBRAY: Yes, Your Honor.

6 THE COURT: Okay. And have you had a chance to
7 discuss the recommendation that your attorney intends to
8 make in this case with your attorney?

9 NATHAN DUBRAY: Yes, Your Honor.

10 THE COURT: Is there anything that you have not
11 been able to discuss with your attorney concerning the
12 sentencing aspect of this case?

13 NATHAN DUBRAY: No.

14 THE COURT: So are you ready to proceed to
15 sentencing today with the understanding you can file
16 whatever motions you need after today?

17 NATHAN DUBRAY: Yes, Your Honor.

18 THE COURT: Okay. Does the State have any
19 additions or corrections to the presentence investigation?

20 MS. LARSON: No, Your Honor.

21 And just as a procedural matter, is it okay if we
22 sit so we can speak into the microphone?

23 THE COURT: I would ask everybody just to remain
24 seated and use the microphone. Thank you.

25 Mr. Hankey, you've had a chance to go through the

1 presentence investigation with Mr. Dubray?

2 MR. HANKEY: Yes, Your Honor.

3 THE COURT: And do you have any additions or
4 corrections?

5 MR. HANKEY: We don't.

6 THE COURT: Okay. And, Mr. Dubray, do you have
7 any additions or corrections that you would like to make
8 to the presentence investigation?

9 NATHAN DUBRAY: No, Your Honor.

10 THE COURT: Okay. Then, does the State wish to
11 present any testimony at this time?

12 MS. LARSON: No, Your Honor.

13 THE COURT: Mr. Hankey, do you wish to present
14 any testimony or call any witnesses?

15 MR. HANKEY: No, Your Honor, just an argument.

16 THE COURT: Okay. Then, let's go ahead and we'll
17 hear from the State, and then we'll hear from Mr. Hankey,
18 and then Mr. Dubray can add anything he would like to add
19 too.

20 Go ahead, Ms. Larson.

21 MS. LARSON: Thank you, Your Honor. In
22 preparation for the hearing today, Your Honor, the Court
23 considered a couple of things. First of all -- or the
24 State did, considered a few things.

25 First of all, the State considered the factors

1 that are set forth in 12.1-32-04, and I have some
2 information I'd like to briefly go through.

3 But, secondly, we also considered prior sentences
4 in similar cases.

5 With respect to the first matter the State
6 considered, we looked at the factors set forth in
7 12.1-32-04. Your Honor, with respect to the first factor,
8 the defendant -- whether the defendant caused significant
9 harm. In this case, as the Court previously noted, the
10 child was an eight-year-old little girl, and the defendant
11 certainly caused significant harm to her.

12 This event in this child's life set off a chain
13 reaction that is almost uncomparable to other cases that
14 I've had. Her life was completely disrupted. She ended
15 up moving. Her mom lost custody.

16 It's a very, very traumatic episode, not only in
17 the sexual act alone but also in her personal life in
18 almost every aspect.

19 For an eight-year-old child, that -- I don't
20 think saying "significant harm" or "serious harm" is
21 stating it enough.

22 Factor No. 2 is whether the defendant planned or
23 expected that his criminal conduct will cause or threaten
24 serious harm to another person. I think even the
25 defendant could acknowledge that, based on the reports

1 that we have and the interview that he did with law
2 enforcement. The defendant indicated repeatedly the
3 effect this would have on a child and that children of
4 this age typically don't make this type of thing up.

5 Further, from the presentence investigation, it
6 appears that this is at least the third time the defendant
7 has been alleged to have committed a similar type event.

8 And so whether or not he's been convicted of such
9 previous episodes, at the very least, the defendant knows
10 the significant impact these types of allegations have and
11 the significant harm that can be caused to a child who's
12 been molested.

13 The presentence investigation also indicates the
14 defendant acknowledged having had done some previous type
15 of sex offender therapy related to a previous allegation,
16 and so that again would lead the Court to believe, at
17 least from the State's perspective, that the defendant
18 certainly would expect that type of behavior causes harm
19 to a child.

20 Number 3, the defendant did not act under strong
21 provocation.

22 Four, there was no grounds to justify or excuse
23 his behavior legally.

24 No. 5, again, it just doesn't apply in a case of
25 a child. A child cannot induce or facilitate such

1 conduct.

2 No. 6, I think it's important to note always in
3 these cases, but especially in this case, there's nothing
4 the defendant can do to make reparation or restitution in
5 this case.

6 This child was an eight-year-old girl who was
7 innocent at the time, and in just one moment -- or two
8 moments, in this case -- the defendant took that away, and
9 that can never be returned to her.

10 No. 7, whether the defendant has any prior
11 history of delinquency or criminal activity or has led a
12 law-abiding life for a substantial period of time. The
13 Court has his prior criminal history. While it's not
14 significant, I think there are some concerning aspects of
15 the presentence investigation regarding his previous
16 conduct and whether it was, in fact, law-abiding.

17 No. 8, whether the circumstances are unlikely to
18 recur. This is the troubling part of this case. The
19 defendant entered an Alford plea. First all, you do have
20 information that the defendant has been alleged to have
21 committed prior events like this one.

22 And when you combine that with the fact that the
23 defendant will not admit fully what he did to this child,
24 it's impossible to state that the defendant won't do it
25 again. A person can't indicate that they won't perpetrate

1 when they won't admit that they have previously.

2 Again, it's also important to note that the
3 defendant claims he was in a blackout state during this
4 episode. However, when you look at the presentence
5 investigation and the information he provided to the
6 evaluator, the defendant provided information about when
7 law enforcement came to the door that evening, and it is
8 very important in the timeline to note that the child was
9 molested right at that time period.

10 So, for some reason, the defendant can remember
11 everything that happened except the relevant portion of
12 being -- molesting that child.

13 Further, the child's mother indicates
14 unequivocally that the defendant did have a recollection
15 and was not blacked out when she was socializing with him
16 that evening.

17 No. 9, it pairs into No. 8, whether his
18 character, history, or attitude indicate he's unlikely to
19 commit another crime. But I would also ask you to
20 consider his cooperation with not only his own expert but
21 the State's presentence investigator. The defendant
22 refused to cooperate with them.

23 Number 10, the State's position based on some of
24 that uncooperativeness with the PSI writer and the
25 evaluator's position about his appropriateness for

1 probation is that the defendant is not particularly likely
2 to respond affirmatively to probation.

3 Eleven does not apply in this case and neither
4 does twelve.

5 Thirteen, whether the defendant abused the
6 position -- a public position of responsibility or trust.
7 I think it's very clear in the presentence investigation
8 what the relationship was with this family and the
9 defendant.

10 This child viewed the defendant as her uncle.
11 She held him out in a position of trust very much so, and
12 so did the mother. It was very apparent to the State,
13 during witness preparation, that the child loved the
14 defendant and probably still does. And it's a very -- it
15 makes this case even more sad having -- the defendant had
16 violated that relationship.

17 Number 14, whether the defendant cooperated with
18 law enforcement. Again, the defendant did do an
19 interview. He did make incriminating statements, but it
20 has been limited throughout in that the defendant denies
21 recollection of the one or two moments in time that are
22 relevant to this case. And that continued -- his behavior
23 continued similarly with the presentence investigation.

24 The second aspect that the State considered when
25 formulating a sentencing recommendation is previous cases.

1 And I believe the recommendation the State is going to
2 make is consistent with previous cases, which I could
3 detail for the Court, but many of them you've presided
4 over, Your Honor. And the State does have the benefit of
5 having, really, prosecuted these cases exclusively for
6 multiple years.

7 And so I believe the recommendation of 30 years
8 at the North Dakota Department of Corrections with
9 15 years suspended for ten years; 10 years of supervised
10 probation; no contact with the victim or her mother; sex
11 offender treatment and follow through with any
12 recommendations; and registration pursuant to 12.1-32-15
13 is an appropriate sentence recommendation, Your Honor.

14 I also would like to request restitution. There
15 is continual accruing restitution because the child is in
16 therapy. Further, the stepmom drove here and stayed
17 overnight last night so she could be present today.

18 And I don't have that information, so I guess I
19 would ask if the Court would perhaps consider giving me 30
20 or 60 days just to make sure we have all our ducks in a
21 row on restitution and maybe provide some guidance for me
22 as to how to address the continual restitution occurring
23 for treatment. I know we've done that in previous
24 judgments.

25 He really does not have credit, Your Honor. He

1 has credit; I mean not significant. It looks like he has
2 credit from September 25th, 2012, to October 9th of 2012.

3 THE COURT: Thank you.

4 Mr. Hankey?

5 MR. HANKEY: Thank you, Your Honor. In getting
6 to know Mr. Dubray and taking a look at his upbringing and
7 family history, I mean, it really starts out as a tragic
8 situation. Never knows his father. Mother dies in a car
9 accident when he was two. Then he goes to live with an
10 aunt who dies of cancer. Anybody who's ever been close to
11 him has committed suicide, died in some way.

12 Then he turns to addiction. And I take a look at
13 this case, and I guess it's kind of a -- the State's
14 position is that Mr. Dubray knew what was going on and was
15 not in a blackout state. It's certainly been our position
16 all along that he was in a blackout state. That's why we
17 did the Alford pleas and proceeded that way.

18 Certainly, reading Ms. W.'s [REDACTED] letter, which
19 I'm sure the Court has, I mean, she certainly does not
20 have that belief or opinion.

21 But I will say that Mr. Dubray did plead guilty.
22 The Court went through a full factual basis, went through
23 an understanding of his rights. And Mr. Dubray did not
24 and is not making this victim go through the process of
25 trial.

1 I take a look at his criminal history, and it is
2 very minor: fleeing police back when he was a juvenile;
3 and we have a DUI in 2009; controlled substance,
4 marijuana, in 2011; DUS 2011; and violation of probation
5 for marijuana back in 2011. And that's it.

6 And then, all of a sudden, now we jump up to two
7 double A felonies. So there is a very limited or minor
8 criminal history, which I think is important.

9 I would note that he did graduate from high
10 school. Did some secondary education. He went to Brown
11 University for video game design. Went to University of
12 North Dakota. Was just one year away from graduating,
13 according to the PSI, when he was in a fight, that got --
14 that got kicked out.

15 He does have a history that he has worked and has
16 been employed. I know as of recently he's had difficulty
17 finding a job, as the PSI reflects, because of the pending
18 charges. Was -- and even tried to get into the Air Force,
19 but because of the eye exam he was not able to do so.

20 Taking a look at what his current wife has to
21 say, and that's kind of an interesting situation as the
22 PSI reflects. But, you know, when he's not using
23 controlled substances, not having addiction issues, he's
24 loving, he's a good father, there's no particular issues
25 with Mr. Dubray.

1 And I think that it is not appropriate to look at
2 the prior events that there were no convictions for and
3 just allegations, saying that this is maybe the third time
4 around for Mr. Dubray. There's been no prior convictions
5 of anything like this.

6 Certainly it's been our position all along that
7 Mr. Dubray was under the influence, and that's why he
8 committed the offense that he pled guilty to. Not that
9 he's some kind of a deviant sexual predator but simply
10 that he more stems from intoxication and from controlled
11 substances than anything else.

12 In taking a look at the risk assessment, he does
13 come back more towards the moderate risk category. I show
14 that it's either -- I don't -- I don't think it comes back
15 high in any of the evaluations. Comes back as moderate.

16 Certainly, I do know that part of what the report
17 indicates was that Mr. Dubray was not accepting
18 responsibility. He was kind of dinged for that. And
19 because of the chemical usage, that was also a factor in
20 the risk assessment.

21 So if we could get rid of those two factors, I
22 think that, you know, it would obviously -- as the report
23 indicates, he would be a lower risk.

24 Taking a look at the factors that we have here, I
25 would certainly point out that factor No. 2, it's been our

1 position that the defendant did not plan or expect that --
2 to even do this criminal act. It's been our position all
3 along that he was in a blackout state, and although he may
4 have pled guilty that these things happened, he didn't
5 plan for this conduct to happen, didn't seek this victim
6 out.

7 As the reports indicate, seems to be that he was
8 intoxicated that night and actually went into another --
9 another person's room that night too without knowing what
10 he was doing. So I think there's certainly an issue with
11 his controlled substance usage and drinking and using
12 marijuana to the point where he blacks out.

13 Would point out that No. 7, although there is
14 history -- I'm looking at 12.1-32-04 -- although there is
15 a history, it is very limited.

16 Would point out that No. 14, the defendant did
17 cooperate. I mean, he's denied this incident. I mean, I
18 shouldn't say "denied." He said he'd been in a blackout
19 state this whole time. He's never wavered from that
20 position.

21 He did interview with law enforcement. He did
22 say some very incriminating things in there, such as, you
23 know, a girl that age, being eight, would have no reason
24 to lie. I mean, he does say very incriminating things in
25 that statement.

1 I believe that to be very candid. I don't think
2 that he was trying to hide the ball and spin things. I
3 think he was very honest and said some very hurtful
4 things, which very much limited our ability of going
5 forward to trial, part of the reason that we ended up
6 pleading guilty pursuant to the open plea.

7 The State is asking for restitution. I would
8 point that out that that is a factor that would go to
9 his -- in his favor if he were to pay -- to pay
10 restitution.

11 With that, Your Honor, I would certainly ask that
12 the defendant be sentenced to, I guess, a much lesser term
13 than the State is asking for. As I look at what the
14 statute is, I believe the minimum mandatories to be five
15 years.

16 I would ask that Mr. Dubray be sentenced to --
17 and we're fine with a lengthy period of probation and a
18 lengthy period of time hanging over his head -- but it
19 would be 30 years with 25 of those years suspended. He
20 would serve the minimum mandatory five years.

21 The ten years of supervised probation we wouldn't
22 object to. We wouldn't object to no contact order. The
23 registration is a requirement. And we wouldn't object to
24 the restitution.

25 As I -- I guess as I look at this case,

1 Mr. Dubray needs chemical dependency treatment more so
2 than he needs anything else. I think that stems from
3 everything -- and all of his delinquent behavior stemmed
4 from what happened on the night in question. He's never
5 wavered from the position that that is exactly what
6 happened and why this incident happened.

7 He said to me all along that he, you know,
8 loved -- loved Ms. W. [REDACTED]. Thought of her as almost like
9 a second mother. Had loved this victim. Would never
10 intentionally do anything to harm this child. Somebody he
11 thinks about every day. He regrets every day.

12 He's wavered back and forth, because in his
13 mind -- and he'll speak to this a little bit -- he never
14 thinks he ever could have done or committed an act like
15 this to someone like that that he loves.

16 And so he has very much struggled with this, as
17 Mr. Fleischman and I know, you know, in coming to the
18 realization of pleading guilty with the facts that we were
19 given and the cards that we were -- that we had to play.

20 And would ask for leniency from the Court, that
21 he's not a predatory offender, did not plan this criminal
22 conduct. This was the result of intoxication, which he's
23 never wavered from -- and allow him a more lenient
24 sentence. Thank you.

25 THE COURT: Thank you. Mr. Dubray, do you wish

1 to state anything?

2 THE DEFENDANT: I can never see myself doing
3 something so heinous, and I'm sorry that M. [REDACTED] had to go
4 through all this. That's all I have to say.

5 THE COURT: Mr. Dubray, is there anything that
6 you think I should know that either you haven't told me or
7 your attorney has not stated today?

8 (An off-the-record discussion was held between
9 the defendant and his attorney.)

10 NATHAN DUBRAY: No, Your Honor.

11 THE COURT: Mr. Dubray, here's what I don't
12 understand is you want to blame your actions on alcohol
13 and drugs. But you were in treatment in Red Wing,
14 Minnesota, and you were discharged for noncompliance. Why
15 is that?

16 NATHAN DUBRAY: I missed two sessions. One was
17 to come down here for court, and the other one I just -- I
18 was extremely tired, and I slept through it, and they
19 kicked me out of the program.

20 THE COURT: How can you be tired? You weren't
21 working, were you?

22 NATHAN DUBRAY: No, Your Honor.

23 THE COURT: Then what were you tired from?

24 NATHAN DUBRAY: I was just tired. I didn't show
25 up. I was irresponsible.

1 THE COURT: Okay. So this says you would show up
2 late for sessions and leave sessions early without
3 permission. Staff also stated they suspecting -- they
4 suspected you were using, but they were not able to test
5 due to your lack of attendance.

6 And, then, Mr. Dubray, we have -- you continued
7 to drink until at least a month prior to the presentence
8 interview. So if drinking would --

9 For one thing, I will tell you, I don't buy that
10 drinking or using drugs has anything to do with
11 perpetrating a sexual offense on a child. I have dealt
12 with many drug and alcohol addicts in my life, and this
13 just isn't something that's common for them.

14 But even giving you the benefit of the doubt, why
15 would you continue to drink or terminate -- be terminated
16 from a treatment program when you were facing this kind of
17 issue?

18 NATHAN DUBRAY: (No response.)

19 THE COURT: Did you drink last night?

20 NATHAN DUBRAY: No, Your Honor.

21 THE COURT: Did you smoke pot last night?

22 NATHAN DUBRAY: No, Your Honor.

23 THE COURT: Did you use any illegal substances in
24 the last week?

25 NATHAN DUBRAY: No.

1 THE COURT: When was the last time you drank
2 alcohol?

3 NATHAN DUBRAY: June.

4 THE COURT: Okay. So you're not under the
5 influence of any kind of substance today?

6 NATHAN DUBRAY: No, Your Honor.

7 THE COURT: Are you on any prescription
8 medication?

9 NATHAN DUBRAY: No.

10 THE COURT: When is the last time you saw your
11 children?

12 NATHAN DUBRAY: About four months ago.

13 THE COURT: So your ex-wife -- and I -- pardon
14 me, I -- if it -- I don't know if you're divorced yet or
15 just have been separated, but she said that your contact
16 with the kids is not very frequent. Is that correct?

17 NATHAN DUBRAY: That's not my choice. It's by
18 her choice.

19 THE COURT: Okay. That's not the -- how I took
20 it. I took it that you just aren't very reliable.

21 NATHAN DUBRAY: I try to see them. I ask her if
22 I can see them, and sometimes she won't even let me talk
23 to them on the phone.

24 THE COURT: Is that because of your current state
25 maybe at the time?

1 NATHAN DUBRAY: I have no idea.

2 THE COURT: So what were you drinking on the
3 night of this offense?

4 NATHAN DUBRAY: Vodka and Jagermeister, some
5 beers.

6 THE COURT: Is there anything more you would like
7 to state at this time?

8 NATHAN DUBRAY: No, Your Honor.

9 THE COURT: Ms. Larson, do you wish to add
10 anything more?

11 MS. LARSON: No, Your Honor.

12 THE COURT: Mr. Dubray, I have considered the
13 facts of this case, the presentence report, and also the
14 similar cases, and I am going to accept the State's
15 recommendation in this case, and it's considerably less
16 than what I have given in the last two, three -- I don't
17 remember -- gross sexuals.

18 But the reason why I'm doing that is because you
19 did accept responsibility, which we had this case well
20 prepared for trial with juror questionnaires and the rest.
21 But at least you accepted responsibility and did not make
22 the eight year old -- and I'm just saying "eight" because
23 that was how old she was at the time of the offense -- you
24 did not make her take the stand.

25 Obviously, if I would allow you to withdraw your

1 guilty plea and you're convicted and we'd gone to trial,
2 that sentence will be considerably different.

3 So what I'm going to do, Mr. Dubray, is impose a
4 sentence of 30 years with the North Dakota Department of
5 Corrections, with 15 years suspended for ten years and ten
6 years of supervised probation. I will give you credit for
7 time served from September 25th through October 9th of
8 2012.

9 You'll be on supervised probation for two
10 years -- or for ten years, excuse me. I'll go over those
11 conditions with you. But they will provide that you are
12 to have no contact with the minor victim or her family
13 members. So that will include any brothers or sisters, a
14 mother, any stepfather, the father, and any stepmother,
15 absolutely no contact. And I don't want you to have any
16 other person contact them for you.

17 You will have to successfully complete sex
18 offender treatment before you're considered for release.

19 And, then, you will have to register as a sex
20 offender as required by North Dakota law.

21 I am going to leave -- I am going to order
22 restitution in an initial amount to be determined within
23 90 days. But, then, restitution for any treatment for
24 that -- the minor child is ongoing, and that will continue
25 throughout the supervised probation period until this case

1 expires.

2 So that means the State is going to have to
3 frequently provide updates as to the restitution figures
4 so that we can enter judgments to include those amounts.

5 And in imposing this sentence, Mr. Dubray, I have
6 considered that your criminal conduct did cause serious,
7 irreparable harm to the eight-year-old child. She will
8 never be the same. She'll never be an innocent
9 eight-year-old child again, because she had to endure
10 things that an eight year old should never have to even
11 hear about, let alone experience.

12 I don't find that you planned this out, but I
13 certainly do find that you could expect that this would
14 result because of your conduct. You yourself admitted
15 that children don't normally lie about these things. You
16 have a prior history of allegations of sex offenses and
17 were even in a treatment program in the past.

18 There was no reason, no strong provocation for
19 this. Even if I buy your story that you were in a
20 blackout state, that was self-induced intoxication and use
21 of chemicals. There were no grounds at all that would
22 justify or excuse your conduct. Obviously, an
23 eight-year-old child can do nothing to induce or
24 facilitate a crime.

25 And I find it unlikely that you can ever make any

1 monetary restitution based on your lack of stable
2 employment. But you just simply can't make restitution or
3 reparation to a child for what happened to her in this
4 case.

5 I also already indicated, I considered your --
6 the prior allegations of sexual abuse that were disclosed
7 in the presentence report. I do find that your conduct is
8 likely to recur unless you receive treatment and take this
9 seriously, and that's based on the prior history. It's
10 also based on the fact that you tend to blame this all on
11 the use of alcohol and drugs.

12 Your history and attitude at this time indicate
13 that the crime is likely to occur again also. You didn't
14 want to cooperate with the presentence investigator, and
15 now today you want to withdraw a guilty plea, even though
16 we clearly accept -- I clearly accepted your guilty plea
17 that was previously entered.

18 At this time I don't think you're going to
19 respond affirmatively to probationary treatment, and I
20 don't think you will until you will admit your offense and
21 accept responsibility for it.

22 I don't -- you're not elderly. You're not in
23 poor health.

24 If this doesn't cause an undo hardship to you, it
25 certainly does to your children. But from what I can

1 glean from the presentence investigation, you haven't been
2 too involved in your children's lives lately, even though
3 it's pretty clear your oldest son thinks the world of you.

4 I do find that you abused a position of
5 responsibility or trust just by the fact that -- alone
6 that you were an adult and this is a child, but also you
7 were a close family friend, and the child viewed you as an
8 uncle.

9 Now, with respect to No. 14, and I have
10 considered this, and that's why I'm giving you a lesser
11 sentence than I would normally give, is that I do feel at
12 this point, having accepted your guilty plea and
13 proceeding to sentencing, that you did cooperate when you
14 entered a guilty plea, and you cooperated by speaking to
15 law enforcement when they interviewed you at -- shortly
16 after this incident.

17 So we will also go over conditions of probation
18 at this time. Do you want a copy to follow along?

19 MR. HANKEY: We have the one from the PSI, Your
20 Honor.

21 THE COURT: And I'll just probably -- actually,
22 it should be pretty much the same; so...

23 MR. HANKEY: Okay.

24 THE COURT: So, Mr. Dubray, Mr. Hankey and
25 Mr. Fleischman do have a copy of the conditions of

1 probation. I'm going to go through those, if you want to
2 follow along.

3 Do you have those in front of you?

4 NATHAN DUBRAY: Yes.

5 THE COURT: While on probation you cannot violate
6 any federal, tribal, state, county, or municipal criminal
7 law or ordinance. You cannot own, purchase, borrow,
8 possess, use, or carry any type of firearm, destructive
9 device, or dangerous weapon.

10 I'm going to stop right there and just go back
11 for the clerk's benefit. On the mandatory fines and fees,
12 I'm going to waive those as well as -- are you privately
13 retained?

14 MR. HANKEY: I am.

15 THE COURT: Okay. So allegation -- or the third
16 condition, we'll go back to that, is that you cannot
17 defraud a urine test administered as a condition of
18 probation.

19 And once you're released from incarceration, you
20 will have to seek or maintain suitable employment or
21 pursue a vocational or educational course of study that
22 will lead to future or better employment.

23 You cannot use or possess any alcoholic beverage
24 or enter any liquor, beer, or wine establishment unless
25 authorized by your probation officer.

1 You cannot use or possess any non-prescribed
2 controlled substances, and it is a violation of probation
3 for you to knowingly associate with users or traffickers
4 in controlled substances.

5 You cannot associate with any known felons
6 without prior permission from your probation officer.

7 And you cannot use or possess any surveillance or
8 countersurveillance equipment without written permission
9 from your probation officer.

10 You will have to keep your probation officer
11 informed in the manner they direct of any changes in your
12 place of residence, employment, and other pertinent
13 activities.

14 Your probation officer will have the right to
15 visit your residence or place of employment or -- and
16 place of employment at reasonable hours.

17 Within 24 hours of your release from the
18 Department of Corrections, whether you're paroled or
19 released to probation, you will have -- have to report to
20 the parole or probation office as they instruct.

21 You will submit your person, your place of
22 residence, your vehicle, and any other property to which
23 you may have access to search and seizure at any time of
24 the day or night by a probation officer, with or without a
25 search warrant.

1 You will not leave the state of North Dakota
2 without permission from your probation officer, and you
3 will waive extradition to the state of North Dakota from
4 any jurisdiction where you may be found. And you will not
5 contest the efforts of the State of North Dakota to return
6 you to this jurisdiction while your probation is in
7 effect.

8 You will support your dependents.

9 And you will regularly attend weekly self-help
10 groups as recommended by your probation officer; so that
11 could be Alcoholics Anonymous, Narcotics Anonymous, or Sex
12 Addicts Anonymous, or sexual -- Sexaholics Anonymous.

13 You will submit to any medical examination or
14 other reasonable testing at the request of your probation
15 officer for the purpose of determining whether you are
16 using drugs or alcohol. And it is a violation of
17 probation for you to use any adulterants that may affect
18 the results of that test.

19 You will receive a chemical dependency evaluation
20 and comply with all treatment recommendations, subject to
21 your right to a hearing before the Court if you disagree
22 with those recommendations.

23 You will have to pay restitution. And the
24 restitution, again, the initial amount, will be determined
25 within 90 days, plus you'll be responsible for paying the

1 costs for ongoing treatment or therapy for the minor
2 victim. And if at any time you disagree with the amounts,
3 you will have 30 days once you receive the requested
4 amount to request a hearing.

5 The Department of Corrections will have the right
6 to require you to pay a supervision fee of \$55 per month
7 while on supervised probation, and they will also charge
8 you \$50 for completion of the presentence investigation.

9 The Department of Corrections does have the
10 authority to impose community constraints as intermediate
11 measures to avoid revocation.

12 You will have to submit to fingerprinting at the
13 direction of your probation officer, and you will have to
14 provide a sample of DNA for inclusion in the DNA database.

15 Mr. Dubray, it is a violation of your probation
16 for you to telephone or write to the victim and her family
17 members or contact the victim's -- contact the victim or
18 her family members or be within 100 yards of any of them
19 without written permission from your probation officer.
20 And you cannot enter onto the premises, travel past, or
21 loiter near where the victim or her family members reside
22 without written permission from your probation officer.

23 You will participate in and successfully complete
24 a cognitive restructuring program if requested by your
25 probation officer.

1 And your probation officer will have the right to
2 place you on an electronic surveillance system at any
3 time.

4 And, then, you'll have to participate in and
5 successfully complete all sex offender treatment program
6 rules and requirements and admit responsibility for your
7 offense as part of the treatment requirements. And you
8 will attend aftercare if recommended by your probation
9 officer or treatment staff.

10 You will have to register your residential
11 address, employment, or school in accordance with North
12 Dakota Century Code section 12.1-32-15 with the law
13 enforcement in the county or city of your intended
14 residence as a sex offender or a felony offender against
15 children within three days of the date of the criminal
16 judgment or your release from physical custody; so in this
17 case it will be your release from physical custody.

18 If you change your name, your school, your
19 residential address or employment, you shall inform the
20 law enforcement agency within -- with whom you are
21 registered within ten days before the change. And if you
22 change your school, residential address, or place of
23 employment, you shall also register at the law enforcement
24 agency having jurisdiction of the new place of residence,
25 school, or employment within three days after the change.

1 If you change your name, your vehicle
2 information, your e-mail address or online name, you must
3 notify the registering law enforcement agency within three
4 days of the effective date of that change.

5 You shall not initiate, establish, or maintain
6 contact directly or indirectly with any child under the
7 age of 18 or attempt to do so, except under circumstances
8 approved in advance and in writing by your probation
9 officer.

10 You may only reside at a place of residence
11 approved by your parole or probation officer, and you may
12 not move from your place of residence or sleep elsewhere
13 overnight without your parole or probation officer's
14 knowledge and permission, and those with whom you reside
15 must know that you are a sex offender.

16 You shall maintain employment at only such places
17 as are approved by your parole or probation officer, and
18 it is a violation of probation for you to work outside the
19 state of North Dakota or leave the state of North Dakota
20 without permission under the interstate compact for the
21 supervision of adult offenders.

22 You cannot go to or loiter near schoolyards,
23 parks, playgrounds, arcades, or other places primarily
24 used or visited by minors. It is a violation of probation
25 for you to obtain employment with any agency or place of

1 business that provides services for the care or custody of
2 minors, and you may not operate a business that provides
3 such services without written permission of your probation
4 officer.

5 You cannot purchase, possess, or use sexually
6 stimulating materials of any kind or use 900 telephone
7 numbers.

8 You cannot subscribe to any Internet service
9 provider by modem, land, DSL, or any other manner, and you
10 may not use another person's Internet through any
11 commercial venue until and unless approved in writing by
12 your probation officer.

13 You cannot possess children's items including,
14 but not limited to, children's clothing, toys, games,
15 pictures, and books without written permission from your
16 probation officer.

17 It is a violation of your probation for you to
18 date or socialize with anybody who has children under the
19 age of 18 without written permission of your probation
20 officer.

21 You will notify your probation officer of any new
22 and existing romantic or sexual relationship in which you
23 may be involved.

24 And you shall submit to any program of
25 psychiatric, psychological, or physiological assessment

1 approved by the Court.

2 You will be financially responsible for all costs
3 related to assessments, polygraphs, and treatment
4 programming ordered by the Court.

5 Ms. Larson, do you have anything further?

6 MS. LARSON: No, Your Honor.

7 THE COURT: Mr. Hankey?

8 MR. HANKEY: No, Your Honor.

9 THE COURT: Mr. Dubray, do you have any questions
10 at all?

11 NATHAN DUBRAY: No.

12 THE COURT: Mr. Dubray, I'm going to have you
13 sign the conditions of probation, but before you do that,
14 I do want you to know that you have the right to appeal
15 this decision. Any notice of appeal needs to be filed
16 within 30 days of the date of the judgment.

17 So the judgment will be dated today. That will
18 start the 30 days. And also -- so you'll want to discuss
19 that right to appeal with Mr. Hankey, along with your
20 motion to withdraw your guilty plea. And, then, once
21 those have been filed, we'll take a look at them.

22 With respect to these two counts, I forgot to
23 state that they do run concurrently.

24 I will remand Mr. Dubray to the custody of the
25 Grand Forks County Correctional Center for transportation

1 to the Department of Corrections.

2 I'm just going to ask Mr. Hankey if you know
3 that -- I mean, I'll give you a chance to discuss
4 everything that's happened with Mr. Dubray --

5 MR. HANKEY: Okay.

6 THE COURT: -- but if you're going to file a
7 motion for a new trial and you'll need testimony from him
8 and just need him kept here for just, say, 60 to 90 days,
9 even if you withdraw and he gets another attorney for that
10 purpose, just let me know so we can let the correctional
11 center know, because my guess is they'll start working on
12 the paperwork to get him transported.

13 MR. HANKEY: Okay.

14 (The document is signed.)

15 MR. HANKEY: May I approach, Your Honor?

16 THE COURT: Yes.

17 (Handing to the Court.)

18 THE COURT: Thank you. Mr. Hankey, I'm going
19 to -- I have the criminal judgment done --

20 MR. HANKEY: Sure.

21 THE COURT: -- so I'm going to have you take a
22 look at it, and we'll give it to Ms. Larson, just to see
23 if you see any corrections before it does get filed.

24 (The attorneys examine the document.)

25 MS. LARSON: May I approach, Your Honor?

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THE COURT: Yes.

MS. LARSON: I didn't notice anything.

THE COURT: And you didn't notice anything?

MS. LARSON: No.

MR. HANKEY: We didn't either, Your Honor.

THE COURT: Okay. Mr. Dubray is remanded to the custody of the Grand Forks County Sheriff's Department at this time for transportation to the correctional center.

We will get copies of the judgments to counsel and the conditions of probation and also to Mr. Dubray.

MR. HANKEY: Okay.

MS. LARSON: Thank you.

THE COURT: This hearing is adjourned, and we'll go ahead and disconnect the phone.

(The proceedings were concluded at 10:13 a.m.)

CERTIFICATE OF COURT REPORTER

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF GRAND FORKS)

I, Marsha Allmaras, a duly appointed official
court reporter,

CERTIFY that I recorded in shorthand the
foregoing proceedings had and made of record at the time
and place indicated.

I FURTHER CERTIFY that the foregoing and attached
39 typewritten pages contain an accurate transcript of my
shorthand notes then and there taken.

Dated at Grand Forks, North Dakota, this 9th
day of October, 2014.

Marsha Allmaras

Marsha Allmaras
Official Court Reporter

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REGISTER OF ACTIONS

CASE NO. 18-2014-CV-00960

Nathan G Dubray vs. State of North Dakota

§
§
§
§
§
§
§

Case Type: Post Conviction Relief

Date Filed: 07/14/2014

Location:

Judicial Officer: Kleven, Debbie

Supreme Court Docket Number: 20140428

RELATED CASE INFORMATION

Related Cases

18-2012-CR-01960 (Related Case)

PARTY INFORMATION

Petitioner Dubray, Nathan G
 #39395
 2521 Circle Drive
 Jamestown, ND 58401
 DL: NDDUB857102

Male Indian
 DOB: 1985
 SSN: XXX-XX-7603
 6' 0", 200 lbs

Attorneys
 Monty Grant Mertz
 Retained
 701-298-4640 x0000(W)

Respondent State of North Dakota

Mark Jason McCarthy
 Retained
 701-780-8281 x0000(W)

EVENTS & ORDERS OF THE COURT

OTHER EVENTS AND HEARINGS

07/14/2014 [Application](#) Doc ID# 1
 for Post-Conviction Relief

07/14/2014 [Brief](#) Doc ID# 2
 in Support of Application for Post-Conviction Relief

07/14/2014 [Request](#) Doc ID# 3
 for Hearing on Petitioner's Application for Post-Conviction Relief

07/14/2014 [Notice of Assignment and Case Number](#) Doc ID# 4

07/14/2014 [Service Document](#) Doc ID# 5

07/18/2014 [Notice of Hearing](#) Doc ID# 6
 Notice to Appear - Post Conviction Hearing

07/18/2014 [Service Document](#) Doc ID# 7
 Certificate of Service

07/21/2014 [Application for Appointed Defense Services](#) Doc ID# 8

07/21/2014 [Notice of Eligibility for Appointed Counsel](#) Doc ID# 9

07/24/2014 [Answer](#) Doc ID# 10
 Answer to Petitioner's Application for Post-Conviction Relief

07/24/2014 [Service Document](#) Doc ID# 11
 Affidavit of Service by Mail

07/30/2014 [Assignment](#) Doc ID# 12
 Conflict Re-assignment-Post Conviction (Monty Mertz)

08/11/2014 [Stipulation / Agreement](#) Doc ID# 13
 Stipulation to Continue Evidentiary Hearing

08/11/2014 [Proposed Order](#) Doc ID# 14
 Order to Continue Evidentiary Hearing

08/11/2014 [Service Document](#) Doc ID# 15
 Affidavit of Service by Electronic Filing

08/15/2014 [Order](#) Doc ID# 16
 to Continue Evidentiary Hearing

08/15/2014 [Continuance](#)
 Per Order to Continue Evidentiary Hearing

08/15/2014 [Notice of Hearing](#) Doc ID# 17
 Continued Notice of Evidentiary Hearing

08/15/2014 [Service Document](#) Doc ID# 19
 Certificate of Service

09/15/2014 [Service Document](#) Doc ID# 20
 Affidavit of Service By Electronic Filing

09/15/2014 [Notice](#) Doc ID# 21
 Notice of Change of Assignment of Attorney

09/16/2014 [Sheriff's Return Served](#) Doc ID# 22
 Sheriff's Return of Service-subpoenas

09/18/2014 [Request](#) Doc ID# 23
 Request for Transcript

09/18/2014 [Proposed Order](#) Doc ID# 24
 Proposed Order for Transcript

09/18/2014 [Service Document](#) Doc ID# 25



09/22/2014 Certificate of Service on M. Jason McCarthy
Order Doc ID# 26
Order for Transcript

10/10/2014 Service Document Doc ID# 28
Certificate of Service

10/13/2014 Motion Doc ID# 29
Motion for Order for Transportation

10/13/2014 Proposed Order Doc ID# 30
Order for Transportation

10/13/2014 Service of Motion Doc ID# 31
Certificate of Service on M. Jason McCarthy

10/14/2014 Order Disposing of Motion Doc ID# 32
Order for Transportation

10/20/2014 Post-Conviction Hearing (11:00 AM) (Judicial Officer Kleven, Debbie)
Steno Notes MA 10-20-14
08/21/2014 Continued to 10/20/2014 - Continuance - Other - Dubray, Nathan G
Result: Hearing Ended

10/21/2014 Exhibit Doc ID# 33
Exhibit #: 1. Exhibit Description: Correspondance in the Criminal Case. (Received)

10/21/2014 Exhibit Doc ID# 34
Exhibit #: 2. Exhibit Description: Documentation Sent to Defendant. (Received)

11/20/2014 Order Doc ID# 35
Order Denying Application for Post-Conviction Relief

12/03/2014 Notice Doc ID# 36
Of Appeal - For Transcript - Forwarded To The Clerk Of Supreme Court On December 4, 2014

12/03/2014 Request Doc ID# 37
For Transcript - Forwarded To The Court Reporter/Recorder And Clerk Of Supreme Court On December 4, 2014

12/04/2014 Notice Doc ID# 39
Notice of Appeal by Nathan Dubray (duplicate filing to docket #36)

12/04/2014 Notice of Filing the Notice of Appeal Doc ID# 40
Notice of Filing Notice of Appeal

12/04/2014 Service Document Doc ID# 41
Affidavit of Service for Notice of Appeal

01/02/2015 Clerk's Certificate on Appeal Doc ID# 42

01/09/2015 Clerk's Certificate on Appeal Doc ID# 43
Amended

02/19/2015 Application for Appointed Defense Services Doc ID# 44
For Judges Review

02/20/2015 Application for Appointed Defense Services Doc ID# 45
Appointed

02/20/2015 Notice of Eligibility for Appointed Counsel Doc ID# 46

02/23/2015 Assignment Doc ID# 47
Notice of Eligibility for Appointed Counsel to Monty Mertz

03/09/2015 Transcript Doc ID# 48
Redacted Text Key of Post-Conviction Relief Hearing held on 10-20-2014

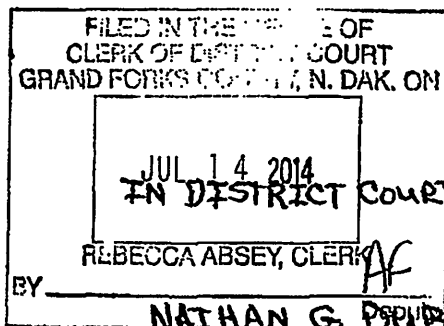
03/09/2015 Transcript Doc ID# 49
Transcript of post-conviction relief hearing held on 10-20-2014

11/12/2015 Supreme Court Judgment/Opinion Doc ID# 50
Opinion - Affirmed

11/12/2015 Supreme Court Judgment/Opinion Doc ID# 51
Judgment

11/12/2015 Transcript Doc ID# 52
Post-Conviction Relief Hearing dated October 20, 2014

11/12/2015 Confidential Information Form Doc ID# 53
Redaction Key October 20, 2014



IN DISTRICT COURT, COUNTY OF GRAND FORKS, STATE OF NORTH DAKOTA

REBECCA ABSEY, CLERK

BY

NATHAN G. DUBRAY,

Petitioner,

VS.

STATE OF NORTH DAKOTA,

Respondent.

APPLICATION FOR
POST-CONVICTION RELIEF

Civil no. 18-2014-CV-00900

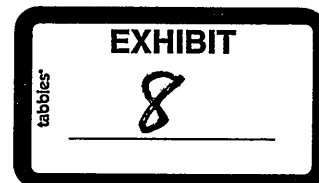
Related Crim. No. 18-2012-CR-01960

The Petitioner, Nathan G. Dubray, ("petitioner"), PRO SE, respectfully makes application for post-conviction relief and hearing pursuant to N.D.C.C. 29-32.1 And in support thereof represents and shows to the court:

I.

That Judgment was entered and sentence imposed in Grand Forks County, CASE NO. 18-2012-CR-01960, by the Honorable Debbie Kleven, District Court Judge, on the 4th day of October, 2013, for the offenses of GROSS SEXUAL Imposition. (SEE, Criminal Judgment of October, 4, 2013, Summary Index # 78; SEE ALSO Amended Criminal Judgment of January 3, 2014 Summary Index # 88).

II
(1)



That said sentence was for a period of Thirty (30) years, with all but fifteen (15) years suspended for a period of TEN (10) years with credit for time served of Fourteen (14) days, on Count-1, Gross Sexual Imposition, A CLASS AA Felony And Count-2, Gross Sexual Imposition, A CLASS AA Felony, with both counts concurrent to one-another.

III.

That petitioner deems himself aggrieved by said Judgment and sentence upon the following specific and independent grounds.

1.) Petitioner received ineffective assistance of counsel during the original proceeding, outside the range of competence demanded of attorneys in a criminal case, in violation of the sixth Amendment of the United States Constitution and even greater possible protection pursuant to Article I, Section 12 of the North Dakota Constitution.

2.) Petitioners counsel failed to interview or depose: Bobby Joe Bull; Torey Lynn Killscrow; Shelby Joleen Weist; Thomas Weist; or Mario Alcon, each of whom would be essential to his defense for trial. This failure was outside the range of competence demanded of attorneys in a criminal case, in violation of the Sixth Amendment of the United States Constitution and even greater possible protections pursuant to Article I, Section 12 of the North Dakota State Constitution

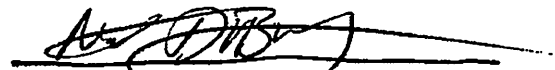
3.) Petitioner's counsel failed to hire an expert to determine if the evidence given by the alleged child victim, during the forensic interview on January 9, 2012 at 0900 hours, and conducted by Tammy Knudson of the Grand Forks County Social Services, was tainted by "concerned" adults. This failure was outside the range of competence demand of attorneys in a criminal case, in violation of the Sixth Amendment of the United States Constitution and even greater possible protections pursuant to Article I, Section 12 of the North Dakota Constitution,

4.) The PROSECUTION ERRED in CHARGING Petitioner with two CLASS AA Felonys in which he did not commit; PREJUDICING Petitioner. There by contributed to his WRONGFULL conviction, in violation of the Fifth Amendment to the United States Constitution and EVEN GREATER possible protection pursuant to Article I, Section 12 of the NORTH DAKOTA Constitution.

IV

That the petitioner, has taken no other Actions, to SECURE RELIEF FROM SAID Judgement of Conviction And sentence.

Dated this 8th day of July, 2014



NATHAN G. DUBRAY
JRCC

2521 CIRCLE DRIVE
Jamestown, North Dakota 58401

IN DISTRICT COURT, COUNTY OF GRAND FORKS, STATE OF NORTH DAKOTA

NATHAN G. DUBRAY,
Petitioner,
VS.

BRIEF IN SUPPORT OF
APPLICATION FOR

Post-Conviction RELIEF

Civil no. 18-2014-CV-00900

Related crim. no. 18-2012-CR-01960

FILED IN THE OFFICE OF
CLERK OF DISTRICT COURT
GRAND FORKS COUNTY, N. D.

JUL 14 2014

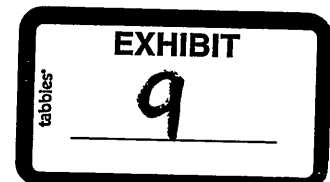
REBECCA ABSEY, CLERK
BY AF Deputy

BACKGROUND

[P.1.] Petitioner, Nathan G. Dubray, ("Petitioner"), was charged with the offense's of: (1) GROSS SEXUAL Imposition, Count-1, A CLASS AA Felony, and (2) GROSS SEXUAL Imposition, Count-2, A CLASS AA felony, by information. SEE, Summary Index-#2.

[P.2.] That on October 4th, 2013, on advice of Counsel, Petitioner pled guilty to both offenses of GROSS SEXUAL Imposition, and was subsequently sentenced, by the HONORABLE Debbie Kleven, District Court Judge ("COURT"). To a term of fifteen (15) YEARS INCARCERATION, NORTH DAKOTA DEPARTMENT OF CORRECTIONS AND REHABILITATION. Followed by A term of ten (10) YEARS PROBATION, on each Count, And to RUN CONCURRENT to one-another.

(1)



2

SEE, Criminal Judgement, Summary Index-# 78;
SEE ALSO, Amended Criminal Judgement, Summary Index-# 88.

[P3] Petitioner has filed no other post-conviction Relief applications, appeals or motions to secure Relief from the Judgement of conviction and Sentence in this matter.

[P4] Petitioner reserves his rights to amend, add additional grounds, add supplemental information or affidavits in support thereof, after the appointment of counsel on this Application for Post-Conviction Relief ("Application"), or at any time during the proceeding.

[P5] The North Dakota Century Code § 29-32.1-01 states that a person may apply for Post-Conviction Relief for several reasons. Applicable to this case is that: (1) The conviction was obtained or the sentence was imposed in violation of the laws or the Constitution of the United States or the laws or Constitution of North Dakota; (2) The Court that rendered the Judgement of Conviction and Sentence

WAS WITHOUT JURISDICTION OVER THE PERSON OF THE APPLICATION OR THE SUBJECT MATTER;
 (3) The sentence is not authorized by law;
 (4) Evidence, not previously presented and heard, exists requiring action of the conviction or sentence in the interest of justice; (5) The Applicant is otherwise unlawfully in custody or restrained. SEE, N.D.C.C. § 29-32.1-01(a), (c), (d), and (g). Following are the grounds petitioner brings before the court for Post-Conviction Relief:

A. INEFFECTIVE ASSISTANCE OF COUNSEL

[16.] Article 1, section 12 of the North Dakota Constitution guarantees a criminal defendant effective assistance of counsel. SEE, HECKELSMILLER V. STATE, 2004 ND 191, ¶ 3, 687 N.W.2d 454.

In accord with the test established by the United States Supreme Court in STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant claiming ineffective assistance of counsel must prove
 (1) Counsel's representation fell below an

objective standard of reasonableness, and
 (2) the defendant was prejudiced by
 counsel's deficient performance. Id.

[96] "Effectiveness of counsel is measured by an 'Objective Standard of Reasonableness' considering 'prevailing professional norms.'" Id., (quoting Strickland, 466 U.S. At 688, 104 S.Ct. 2052). The defendant must first overcome the "Strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id., (quoting Strickland 466 U.S. At 689, 104 S.Ct. 2052). Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight. Id.

[97] The prejudice element requires a defendant to establish a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different" Id. At 94. Not only does a criminal defendant have "the heavy, demanding

burden of proving Counsel's Assistance was ineffective." Id. (quoting Mertz v. State, 535 N.W.2d 834, 836 (N.D. 1995)). A defendant claiming ineffective Assistance of Counsel "must specify how and where trial Counsel was incompetent and the probable different result." Id. (quoting State v. Palmer, 2002 N.D. 5, ¶11, 638 N.W.2d 18). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. (quoting Strickland, 466 U.S. at 649, 104 S.Ct. 2052). If it is easier to dispose of an effectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id. (quoting Strickland, 466 U.S. at 697, 104, S.Ct. 2052)

[¶8] The North Dakota Supreme Court has indicated and adopted the same two prong test on a claim of ineffective Assistance of Counsel in a Post-Conviction Relief proceeding, and on a claim of ineffective Assistance of Counsel, the

following must be proven:

- 1.) [C]ounsel's representation fell below an objective standard of reasonableness and
- 2.) the petitioner was prejudiced by Counsel's deficient performance.

SEE, CLARK V. STATE, 2008 N.D. 234, ¶12, 758 N.W.2d 900 (citations omitted). Effectiveness of counsel is measured by an 'objective standard of reasonableness' considering 'prevailing professional norms.' Id., At ¶12 (citing Lenge v. State, 522 N.W.2d 179, 181 (N.D. 1994), (quoting Strickland, 466 U.S. At 688, 104 S.Ct. 2052.)

[¶9] the prejudice element requires a showing of "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." SEE, FLAHERTY V. STATE 2006 ND. 76, ¶7, ¶17, 712, N.W.2d. 602 (citing Heckelsmiller v. State, 2004 ND 191, ¶4, 687 N.W.2d. 454.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

[¶10] In the present matter Petitioners Counsel's Representation fell below an Objective Standard of Reasonableness. It is Required that petitioner overcome A Strong Presumption that Counsel's performance fell within the "wide Range" of Reasonable Professional Assistance Prompting Counsel's performance to fall below and objective standard of Reasonableness SEE, Johnson v. State, 2006 ND. 122, ¶20, 714 NW.2d 832, 841.

[¶11] It would have been Reasonable for An Attorney Representing petitioner to:

① conduct a full and complete investigation of all relevant facts himself, or hire an investigator to conduct the investigation. Had Counsel conducted this investigation, Counsel would have discovered that evidence given by the Alleged Child Victim, during the forensic interview on January 9, 2012, which was conducted by Tammy Knudson, of the Grand Forks

County Social Services, was tainted by "CONCERNED" Authority figures, including but not limited to: Anxious parents and other adult family members, school teachers, police officials, social worker therapists. Further, Counsel would have discovered that the forensic interview was conducted seven (7) days after the alleged incident, and that during this seven (7) days, prior to the forensic interview, the alleged child victim had been repeatedly questioned by several authority figures in different settings, and this repeated questioning, interviewing and counseling tainted the alleged child victim such that the alleged child victim is not competent under the rules of evidence, as the alleged child victim's memory of the events has been tainted by this questioning, interviewing, or counseling. This evidence of tainted memory would have raised reasonable concern as to whether the alleged child victim would be able to testify by memory,

Clearly a highly advanced inquiry into the atmosphere and demeanor surrounding verbal interactions between the alleged child victim and concerned adults.

The notion that a child witness is peculiarly susceptible to influence, while comporting with our intuition and common experience, is in fact an extensively well-researched topic. In this regard, courts across the nation are recognizing this phenomenon and are taking concerted action to ascertain children's evidentiary competency. SEE, STATE V. HUSS, 506 N.W. 2d 290 (Minn. 1993); People v. Meeboer, 439 Mich. 310, 324-325, 484 N.W. 2d 621 (Mich. 1992); Pyron v. State, 237 Ga. App. 198, 199, 514 S.E. 2d 51, 52 (Ga. Ct. App. 1999); Felix v. State of Nevada, 849 P.2d (Nev. 1993); NEW JERSEY V. MICHAELS, 136 N.J. 299, 624 A.2d 1372 (N.J. 1994).

Failure to investigate or conduct any research into the fact that the alleged child victim's memory may have been

tainted by adult Authority figures fell below what is expected and required by a reasonable attorney in this situation, SEE, Johnson v. State, 2006 ND 12, ¶20, 714 N.W.2d 838, 841. Had counsel not failed in its duty to investigate relevant matter, the court would have been informed that the reliability of the statements from the alleged child victim raises reasonable concern and petitioner would have insisted on going to trial, and would not plead out on advice of counsel. This error was so serious that petitioner was not accorded the counsel guaranteed by the Sixth Amendment of the United States Constitution, and clearly below the "objective standard of reasonableness" considering prevailing professional norms." SEE, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 624 (1984); Clark v. State, 2008 ND. 234, ¶12, 758 N.W.2d 900; SEE ALSO, North Dakota Rules of Professional Conduct.

② Determine, whether the Prosecuting

Authority knew or should have known that charging petitioner with multiple offenses was multiplicity, highly suspicious and based on fabricated or tainted evidence. Therefore violating petitioners Due Process Clause of the Fifth Amendment of the United States Constitution, which is imposed on the State of North Dakota through the Fourteenth Amendment and Article I, Section 12 of the North Dakota Constitution.

Counsel failed in its duty to show the Court that the prosecuting Authority knowingly disregarded its obligations, which was an abuse of its professional discretion and a violation of petitioner's due process rights, and which was an improper method designed to induce a wrongful plea of guilty. SEE, BERGER V. U.S., 78, 88 (1935).

③ Promptly comply with petitioner's reasonable requests for information, documents, papers, reports, notes and communications as required pursuant

To Rule 1.4 of the North DAKOTA RULES of Professional Conduct ("N.D.R. Prof. Conduct").

Counsel failed to supply petitioner with sufficient information to participate intelligently in discussions concerning the representation and the entering of the plea of guilty, during the original proceeding. Therefore, petitioner was unable to make an intelligent decision as whether to plead out or go to trial. SEE, N.D.R. Prof. Conduct Rule 1.4.

④ Hire an expert to determine if the evidence given by the alleged child victim, during the forensic interviews on January 9, 2012, which was conducted by Tammy Knudson of the Grand Forks County Social Services, was susceptible to influence through coercive, suggestive, or even apparently benign questioning. Also, this expert could have determined the capacity of Tammy Knudson and her interview process to distort the recollection

Of the Alleged Child Victim, and to further determine if MRS. Knudson's interview practices were sufficiently suggestive or coercive to alter irremediably the perceptions of the Alleged Child Victim.

Counsel had at its disposal, in its own "BACKYARD" an expert, namely:

DR. TROY W. ERTZT, Ph.D, Licensed
Psychologist Assessment and Therapy
725 Homline St.
GRAND FORKS NO. DAK. 58201

⑤ Represent petitioner with his skill, thoroughness, legal knowledge, preparation (competence), diligence and with proper communication as is required of a reasonable attorney and the prevailing professional norms, pursuant to Rule (1.1), (1.3) and (1.4) N.D.R. Prof conduct.

Counsel failed in each of his aforementioned duties in the proceeding. Had Counsel even done a perfunctory job,

There is more than a reasonable probability that the outcome would have been different, but for these unprofessional errors of counsel, see, State v. Burke, 2000 ND 24, ¶36, 606 N.W.2d 108, see also, N.D.R. Prof. Conduct.

⑥ Interview and/or depose: Bobby Joe Bull; Torey Lynn Killscrow; Shelby Joelen Weist; Thomas Weist; or Mario Alcon, to determine if the statements, which they made to law enforcement were misleading as to the facts of the underlying offense(s) in this matter.

[¶12] The North Dakota Rules of Professional Conduct set out the foundation and basic duties which are required of a reasonable attorney. It is clear in the present matter counsels failed in these "principles" and "basic duties" during both the original proceeding by failing to investigate the statements made by the alleged child victim and the witnesses.

[P13] The question under the first test in Strickland is whether or not the failure to conduct Any Relevant investigation OR to hire An expert to investigate the statements made by the Alleged Child Victim And the witnesses by counsel is deficient conduct. SEE, Strickland, At 687.

Petitioner argues that it is. Counsel is presumed to have prepared and investigated And then communicated all options with petitioner.

[P14] Investigating All Known facts, statements and evidence are simply a basic part of practicing law. By failing to do Any investigation on his own or hiring an expert to investigate, was deficient below the standard in the community.

[P15] The second test in Strickland, is essentially that petitioner was prejudiced by Counsel's lack of knowledge, investigation And advice, And would that prejudice have made a difference in the outcome. SEE, Strickland At 694.

Petitioner argues that he was prejudiced, and Counsel's errors and advice did make a difference in the outcome. When representing a defendant Counsel must be competent in the basic part(s) of practicing law, such as investigating all known facts, statements and evidence,

[¶16] When negotiating a guilty plea, knowledge of the relevant facts, statements and evidence and an investigation into all underlying facts is essential, and Counsel's failure here was unreasonable and prejudiced petitioner.

[¶17] The prejudice occurred as petitioner would have more thoughtfully considered trying the case before a jury, but for Counsel's failure to prepare, investigate, hire an expert and communicate with petitioner, and upon advice of Counsel this option was effectively denied to petitioner. Had petitioner known that Counsel had failed in his duties, Petitioner

would have replaced him, and put the State to the test at trial, and disputed the case as charged. The uninformed and poor advice of counsel made a difference in the outcome of the case and sentence, and the outcome would have been different had counsel given accurate and informed advice and information to petitioner. Petitioner was inherently misled and uninformed by counsel's deficient performance and advice.

[¶18] In the context of a guilty plea, the prejudice prong of the Strickland test governing a claim of ineffective assistance of counsel is satisfied if the petitioner shows that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. See, Patten v. State, 2008, ND 29, ¶¶ 745 NW.2d 626. In the present case petitioner would not have plead guilty, but for the advice of counsel.

Therefore, the Adversarial process itself was presumptively unreliable during the proceeding. SEE, U.S. V. CRONIC, 466 U.S. AT 659 (1984). It is clear in this situation prejudice occurred and an inquiry is necessary, to determine whether a manifest injustice exists, which is necessary to correct, in the interest of justice.

[P19] Petitioner would request the court to withdraw his guilty plea, which was based on ineffective advice from counsel. This request should not be barred. SEE, Rule 32(2) N.D.R. CRIM. P. which states: "A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because made subsequent to judgement or sentence."

[P20] Petitioner has established fair and just reasons why his plea of

guilty in the original proceeding should be withdrawn, and petitioner has shown a manifest injustice has resulted from the plea of guilty on ineffective advise of counsel, and therefore the court abused its discretion and was without jurisdiction to sentence petitioner to a term of incarceration. SEE, NORTH CAROLINA V. ALFORD, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed. 2d 162 (1970); STATE V. MCKAY, 234 N.W.2d 853 (ND 1975). Therefore, there is a reasonable probability that but for these unprofessional errors of counsel, the result of the original proceeding would have been different. Petitioner has demonstrated with specificity, on some of the issues, how and where counsel was incompetent. SEE, STATE V. BURKE, 2000 ND 24 ¶36, 606 N.W.2d 108. Had counsel, during the original proceeding, done even a perfunctory job there is a very good chance petitioner would not have plead guilty.

[§21] Clearly petitioner did not enter his plea knowingly or intelligently and thus, the withdrawal of the plea is necessary to correct a manifest injustice. SEE, STATE V. BARNES, 2007 N.D. 15, §16, 726, NW.2d 595.

[§22] Each claim of ineffective assistance of counsel here supports ineffectiveness on their own, as each error is sufficiently egregious and prejudicial. SEE, UNITED STATES V. CRONIC, 466 U.S. 648; SEE ALSO, MURRAY V. CARRIER, 477 U.S. 496, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1968). Clearly there were multiple errors here, which each on their own prejudiced petitioner, and made counsel's performance constitutionally defective.

CONCLUSION

[§23] Petitioner was not accorded the counsel guaranteed by the Sixth Amendment, and clearly below the "Objective

STANDARD OF REASONABLENESS" "CONSIDERING PREVAILING PROFESSIONAL NORMS." SEE, STRICKLAND V. WASHINGTON; 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); CLARK V. STATE, 2008 ND 234, ¶12, 758 NW.2d 900, SEE ALSO N.D.R. Prof. Conduct.

[¶24] In the present case the claim of ineffective assistance of counsel is based on matters occurring outside the court room record or transcripts, and therefore, the record and transcripts are not adequate to decide the claim and an evidentiary hearing must be held to consider other evidence beyond the record. SEE, HENKE V. STATE 2009 ND 117, 767, NW.2d 881; WONG V. STATE, 2010 ND 219, 790 N.W.2d 757.

[¶25] while petitioner believes that his Fifth, Sixth and Fourteenth Amendment protections are enough, he believes that he should be afforded even greater Constitutional protection under Article I,

Section 12 of the North Dakota Consitution,
Especially Regarding his due process
Rights And Right to effective Assistance
of counsel, SEE, STATE V. KLODT, 298
N.W.2d 783 (ND 1980). The emphasis of
ARTICAL I, Section 12 of the North Dakota
Constitution should be on protecting
An individuals Right to due process
And effective Assistance of counsel,
Rather than simply just guaranteeing
it. SEE, STATE V. RYDBERG 519, N.W.2d
306, 310 (N.D. 1994).

Dated this 9th Day of July, 2014

Nathan Dubray

NATHAN G. DUBRAY

JRCC

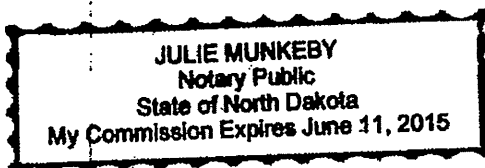
2521 CIRCLE DRIVE


JAMESTOWN, NORTH DAKOTA 58401

VERIFICATION

State of North Dakota } ss
County of Stutsman }

NATHAN G. DUBRAY, being first duly
sworn on oath, deposes and says that
he is the petitioner in the above-entitled
action, that he has read the fore-going
Application and knows the contents
thereof and that the same is true,
and such can be treated as an Affidavit,
except as to matters stated upon information
and belief and as to those matters he
states that he believes them to be true




Notary Public

Dated this day of 9th, July, 2014

IN DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

Nathan G. Dubray,

Petitioner,

v.

State of North Dakota,

Respondent.

ANSWER TO PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF

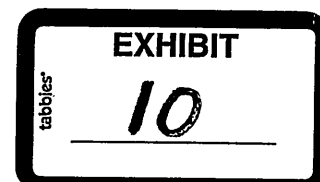
Civil No. 18-2014-CV-00960

Criminal No. 18-2012-CR-01960

SA#121086

[¶1] Respondent, State of North Dakota, by and through the undersigned Assistant State's Attorney, answers to the Application for Post-Conviction Relief as follows:

1. Respondent denies each and every allegation of the Application for Post-Conviction Relief not hereinafter admitted.
2. Respondent admits the statements set forth by Petitioner in Section II Paragraph 1.
3. Respondent specifically denies the allegations set forth by Petitioner in Section III Paragraph 1, 2, and 3 in that the respondent specifically denies that the Petitioner received ineffective assistance of counsel, that additional interviews or depositions of witnesses beyond law enforcement's interviews set forth in Section III Paragraph 2 were necessary or crucial to this case, and that an expert as alleged in Section III Paragraph 3 was necessary and that failure to hire one resulted in effective assistance.
4. Respondent asserts that this was a case involving child molestation in which only two parties were present for the crime, the Petitioner and the juvenile victim.
5. Respondent asserts that the Petitioner, after being Mirandized, made incriminating comments during an interview with law enforcement acknowledging that there would be no reason the juvenile victim would make up such an allegation and children typically are honest regarding such types of allegations.



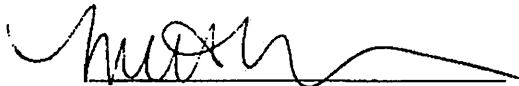
6. Respondent asserts that the relevant witnesses to this case were all interviewed by law enforcement and those interviews were provided to Petitioner's counsel in discovery.
7. Respondent asserts that the juvenile child was interviewed pursuant to protocol followed by the Red River Valley Child Advocacy Center.
8. Respondent asserts that the interview was conducted by a trained and certified forensic interviewer.
9. Respondent asserts that the interview was videotaped and provided to Petitioner's attorney for review in the discovery process.
10. Respondent specifically denies the allegation set forth by Petition in Section III Paragraph 4 in that the Defendant was charged with two distinct and separate sexual contacts he perpetrated upon the juvenile victim; one that took place between January 2 and January 3, 2012 in the early morning hours in which the Petitioner's hand made contact with the juvenile victim's vulva as well as for contact the Petitioner's exposed penis made with the juvenile victim's face and the other that took place later in the morning on January 3, 2012 in which the Petitioner's penis made contact with the juvenile victim's hand and the Petitioner's hand had contact with the juvenile victim's vulva.
11. Respondent asserts that these allegations were set forth clearly in the State's Amended Information which was filed on December 31, 2012 and Affidavit of Probable Cause which was filed on August 6, 2012.
12. Respondent asserts that the Petitioner pled guilty to such offenses on July 15, 2013.
13. Respondent acknowledges that the North Dakota Supreme Court has indicated that generally summary disposition is inappropriate in claims of ineffective assistance of counsel and Petitioners must be permitted a reasonable opportunity to present relevant materials regarding such claims. Wilson v. State, 1999 ND 222, 603 N.W.2d 47.

14. Respondent, however, also acknowledges that N.D.C.C. §29-32.1-09 has recently been amended to allow the Court to dismiss an application on its own motion for various reasons, to include when the claims in the application are meritless, providing that an applicant be given notice and an opportunity to submit evidence before the court considers any evidence outside the pleading to determine the application's merit. Chisholm vs. State, 2014 WL 2866997 (N.D.).

15. Respondent acknowledges the Petitioner filed a brief in support of his Petition for Post-Conviction Relief. Respondent generally denies the assertions contained therein and again puts the Petitioner upon his proof.

[¶2] Wherefore Respondent prays that the Court enter a Judgment denying Petitioner's Application for Post-Conviction Relief.

DATED this 24 day of July, 2014.



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sh

1 STATE OF NORTH DAKOTA IN DISTRICT COURT
2 COUNTY OF GRAND FORKS NORTHEAST CENTRAL JUDICIAL DISTRICT
3
4 Nathan Dubray,)
5 Petitioner,)
6 v.) Case No. 18-2014-CV-00960
7 State of North Dakota,)
8 Respondent.)

9
10
11 T R A N S C R I P T
12 of
13 P R O C E E D I N G S
14 Post-Conviction Relief Hearing
15 October 20, 2014
16 11:12 A.M.

16 TAKEN AT: Grand Forks County Courthouse
17 Grand Forks, North Dakota

18 BEFORE: HONORABLE DEBBIE G. KLEVEN

19 A P P E A R A N C E S

20 FOR THE PETITIONER: MONTY G. MERTZ
21 Attorney at Law
22 Fargo Public Defender Office
23 912 Third Avenue South
24 Fargo, ND 58103

23 FOR THE RESPONDENT: DAVID JONES
24 State's Attorney's Office
25 P.O. Box 5607
Grand Forks, ND 58206-5607

EXHIBIT

tabbles

11

Marsha Allmaras
Registered Professional Reporter
Grand Forks, North Dakota

1

WITNESSES

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RESPONDENT'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>OFFERED</u>	<u>RECEIVED</u>
1	Billing statement from Attorney Hankey's office	28	28
2	E-mails and letters in regard to Nathan Dubray	28	28

Marsha Allmaras

Registered Professional Reporter
Grand Forks, North Dakota

2

1 WHEREUPON,

2 the following proceedings were had, to-wit:

3 THE COURT: Okay. We'll go ahead and go on the
4 record. This is the time set for a post-conviction
5 hearing in Case No. 18-2014-CV-960. It's captioned Nathan
6 Dubray versus the State of North Dakota.

7 Mr. Dubray is present and represented by Attorney
8 Monty Mertz, and the State is represented by Assistant
9 State's Attorney David Jones.

10 Are both sides ready to proceed?

11 MR. JONES: The State is prepared, Your Honor.

12 MR. MERTZ: Yes, Your Honor.

13 THE COURT: Okay. Then, this is the time set for
14 an evidentiary hearing.

15 And, Mr. Mertz, do you wish to proceed first?

16 MR. MERTZ: I certainly can, Your Honor.

17 THE COURT: Or, Mr. Jones, were you planning --

18 MR. JONES: Well, I believe the burden is --

19 THE COURT: It's -- the burden's on the --

20 MR. JONES: Correct.

21 THE COURT: -- plaintiff; so that's how we'll
22 proceed.

23 MR. MERTZ: Your Honor, I'll call Mr. Dubray as a
24 witness.

25 NATHAN DUBRAY, called as a witness, being first

Nathan Dubray-Direct by Mertz

1 duly sworn, was examined and testified as follows:

2 THE COURT: You may go ahead, Mr. Mertz.

3 **DIRECT EXAMINATION BY MR. MERTZ:**

4 Q. Would you state your full name for the record.

5 A. Nathan Gene Dubray.

6 Q. And, Mr. Dubray, you have filed with this Court
7 an application for post-conviction relief; is that
8 correct?

9 A. Yes, sir.

10 Q. And in that application for post-conviction
11 relief, your primary claim is that you received
12 ineffective assistance of counsel; is that correct?

13 A. Yes, sir.

14 Q. And in this case, you were represented by
15 Attorney Blake Hankey; is that correct?

16 A. Yes, sir.

17 Q. Okay. Mr. Dubray, when you were working with
18 Mr. Hankey, did you -- were you aware of whether or not he
19 hired a private investigator?

20 A. I believe he did.

21 Q. He did? Did not?

22 A. Did not.

23 Q. Okay. Did Mr. Hankey take any depositions of any
24 of the State's witnesses?

25 A. No, sir.

Nathan Dubray-Direct by Mertz

1 Q. To your knowledge did Mr. Hankey interview any of
2 the State's witnesses?

3 A. No, sir.

4 Q. To your knowledge did Mr. Hankey explore the
5 possibility of any defense witnesses? Any witnesses on
6 your behalf?

7 A. Not that I can think of.

8 Q. Okay. Now, it's my understanding that you
9 entered an Alford plea basically on the eve of the jury
10 trial; is that correct?

11 A. Yes, sir.

12 Q. Would you explain to the Court what Mr. Hankey
13 did with you to prepare you for trial? What kinds of
14 things did you do with him?

15 A. Basically went over my discovery; and, I mean,
16 that was basically it.

17 Q. He did share the discovery material with you?

18 A. Yeah.

19 Q. Did that include recordings and video recordings?

20 A. Yeah, I was handed everything.

21 Q. And it's my understanding that most of the time
22 pretrial you were not in custody, were you?

23 A. No.

24 Q. Here were you living during the pretrial process?

25 A. In Red Wing, Minnesota.

Nathan Dubray-Direct by Mertz

1 Q. And the trial was going to be here in Grand
2 Forks?

3 A. Yes, sir.

4 Q. Do you know how many times you had face-to-face
5 conferences with Mr. Hankey?

6 A. Not to be exact, but I think three.

7 Q. Okay. Just prior to the trial, did you meet to
8 prepare for your trial?

9 A. Yeah.

10 Q. I'll go back. Let me go back to -- he actually
11 gave you copies of the recordings and the videos?

12 A. Yeah.

13 Q. And were you able to watch those and listen to
14 those recordings?

15 A. Yeah.

16 Q. Okay. When you met with Mr. Hankey, did you
17 develop a theory of a defense in your case?

18 A. (No audible response.)

19 Q. Do you know what I mean by that?

20 A. Not quite sure.

21 Q. Okay. When you were ready to try the case, I
22 think you entered your guilty plea just before the trial;
23 correct?

24 A. Yes.

25 Q. Okay. What was your understanding of your theory

Nathan Dubray-Direct by Mertz

1 of defense at the trial?

2 A. I'm not sure.

3 Q. Okay. Did Mr. Hankey prepare you to testify?
4 Did you discuss the possibility that you would testify at
5 your trial?

6 A. Yes.

7 Q. Okay. And did you feel that you were prepared to
8 testify at your trial?

9 A. Yeah.

10 Q. Okay. But there wasn't a trial, was there?

11 A. No.

12 Q. Okay. Had there been plea bargains or plea
13 negotiations leading up to the day you pled guilty?

14 A. I believe there was. That morning there was, and
15 I took a plea agreement that morning of the trial.

16 Q. Okay. Now, I think the records would show -- or
17 Mr. Hankey's records would show that the State had sent a
18 written plea agreement or made a plea offer prior to that
19 time, hadn't they?

20 A. Yeah.

21 Q. And that plea offer was or was not acceptable?

22 A. Yeah. I mean, I accepted it.

23 Q. You ultimately accepted the plea based on an
24 offer by the State?

25 A. I believe so.

Nathan Dubray-Direct by Mertz

1 Q. Okay. Well, it's just my understanding -- I'm
2 not trying to confuse you, but it's my understanding that
3 it's the practice of the State's Attorney's Office to send
4 a written plea offer prior to a deadline set by the Court.
5 Do you remember getting a plea offer?

6 A. Yes, I do.

7 Q. Okay. Do you remember what the first plea offer
8 was?

9 A. I do not.

10 Q. Okay. But, ultimately, there was an offer made
11 just before the trial?

12 A. Yes.

13 Q. And it's my understanding -- and I did have
14 transcripts prepared -- that you entered a guilty plea
15 under the Alford decision; isn't that correct?

16 A. Yes, sir.

17 Q. And do you feel you understand what that means,
18 what the Alford decision means?

19 A. It's no contest --

20 Q. Okay.

21 A. -- from what I understand. They had enough
22 evidence to charge me guilty.

23 Q. Okay. Okay. Now, Mr. Dubray, as part of your
24 discussions with Mr. Hankey and in the presentence
25 investigation and discovery and all the materials in your

Nathan Dubray-Direct by Mertz

1 case, there were two prior incidents in your past, two
2 incidents in your past prior to this case, where you had
3 been accused of sexual misconduct; is that right?

4 A. There was one. The other one was a lie.

5 Q. Okay. Well, but stay with me here. There was
6 one incident when you were a juvenile --

7 A. Yes.

8 Q. -- where you were accused of touching a younger
9 cousin, a female cousin; is that right?

10 A. Yes.

11 Q. Okay. And as a result of that accusation, in
12 juvenile court you actually entered an admission at some
13 point; didn't you?

14 A. I never -- I never went to court for it.

15 Q. Okay. But you ended up getting some kind of
16 classes for sexual offenders?

17 A. Yes.

18 Q. Now, how did that come about? How did you end up
19 doing those classes?

20 A. I would do them every Tuesday and Thursday in
21 Minot.

22 Q. Okay. But -- no. How did you end up being
23 required to do those classes?

24 A. Basically, they said that if I didn't admit to
25 the act that I would be sitting in the Boys Ranch until I

Nathan Dubray-Direct by Mertz

1 was 21, unless I admitted it and got help; and "help"
2 being the classes that I was required to take for, I
3 believe it was, like, 13 -- 13 sessions, 14 sessions.

4 Q. So what did you choose to do?

5 A. I admitted it.

6 Q. Did you do it?

7 A. No.

8 Q. Okay. Well, why would you admit it if you didn't
9 do it?

10 A. Because I was almost 18.

11 Q. Okay. Were you represented by an attorney when
12 you made that admission?

13 A. No.

14 Q. Okay. So that first accusation that you had
15 touched your young female cousin, you're telling this
16 Court that you did not do that?

17 A. I did not.

18 Q. Okay. Then, there was other -- in the materials
19 in this case, there was an investigation or an allegation
20 that you had actually raped a minor child, a female girl,
21 I think age 14, in New Town; right?

22 A. Yeah.

23 Q. There was an accusation?

24 A. There was.

25 Q. Okay. Did you rape a girl in New Town?

Nathan Dubray-Direct by Mertz

1 A. I did not.

2 Q. Okay. In fact, when that supposedly occurred,
3 where were you living?

4 A. California.

5 Q. Okay. So any suggestion in this case by anyone
6 that you had a history of prior sexual misconduct, was it
7 true or was it false?

8 A. (No audible response.)

9 Q. Do you understand my question?

10 A. Not quite.

11 Q. Okay. There's these two incidents we just talked
12 about.

13 A. Yeah.

14 Q. Okay. You're saying to this Court that you did
15 not touch your young cousin; correct?

16 A. Correct.

17 Q. You did not rape a girl in New Town?

18 A. Correct.

19 Q. Okay. Now, when you were talking to Mr. Hankey
20 about the plea offer and about this trial, did these other
21 incidents come into play in the discussions?

22 A. They did.

23 Q. In what way?

24 A. I mean, the first one, it was -- I'm not quite
25 sure if Hankey knew about it or if the Court knew about

Nathan Dubray-Direct by Mertz

1 it, but it was brought to the attention by -- I believe
2 Mario Alcon had said something about it.

3 And the second one was from Shelby saying that
4 Mario had told her that I raped some girl on a school bus
5 in New Town, and that's how it came about.

6 Q. But how did that then factor into the discussions
7 about whether or not you would plead guilty? Was there
8 some implication that those accusations would be used
9 against you in your trial in this case?

10 A. Yes.

11 Q. Okay. Did that enter into your consideration of
12 whether or not to plead guilty?

13 A. Yes.

14 Q. Mr. Dubray, did you feel coerced or forced into
15 pleading guilty in this case?

16 A. I felt like there wasn't any other choice but to
17 take the agreement.

18 Q. Well, that isn't my question. I mean, there are
19 plenty of cases where the defendant doesn't have any other
20 choice, Mr. Dubray. What's important in this case is
21 whether or not you feel you entered a voluntary -- a
22 voluntary, freely -- you know, of your own free will that
23 you pled guilty in this case, voluntarily and of your own
24 free will.

25 A. I felt like I was led to believe that I was going

Nathan Dubray-Direct by Mertz

1 to be determined guilty no matter what. So I took --

2 Q. Whether you were or not?

3 A. Yes.

4 Q. Okay. In fact, the day of your sentencing, you
5 actually asked the Court if you could withdraw your guilty
6 pleas; isn't that correct?

7 A. I did.

8 Q. And that was because you felt that you were
9 forced into pleading guilty, in essence?

10 A. Yeah.

11 Q. Okay. Now, in your petition for post-conviction
12 relief, you were specifically alleging that Mr. Hankey did
13 not provide adequate defense to you; is that correct?

14 A. Yes.

15 Q. Okay. And we've already talked about things like
16 not -- well, I didn't ask you before. Did he hire any
17 kind of an expert witness to address the issues of a child
18 victim?

19 A. I'm not sure. I think he did. He may have.

20 Q. Okay. Did you discuss that with him? Who was
21 the expert?

22 A. I think it was Stacey Benson.

23 Q. Okay. Now, remember, Stacey Benson, you were
24 supposed to have an evaluation by her after you pled
25 guilty.

Nathan Dubray-Direct by Mertz

1 A. Oh, yeah, that --

2 Q. So don't get confused. This is all before you
3 pled guilty. That's all we're concerned about here today.
4 Do you understand?

5 A. I believe he didn't.

6 Q. Okay. Because you're still maintaining that you
7 don't believe you molested this child; is that correct?

8 A. Yes.

9 Q. Okay.

10 THE COURT: Can I have you not lead him so much?

11 MR. MERTZ: Sure.

12 THE COURT: All I'm really getting out of it is
13 your testimony; so...

14 I kind of want to know what he has to say.

15 MR. MERTZ: That's fair, Your Honor. Thank you.

16 Q. (Mr. Mertz continuing) So what are you asking --
17 just tell us in your own words what you're asking the
18 Court to do for you in this case.

19 A. Go back to trial.

20 Q. And why should the Court allow you to do that?

21 A. I just believe I'm innocent.

22 Q. How -- can you explain to the Court how
23 Mr. Hankey could have done something differently in this
24 case that would change the outcome?

25 A. Cross-examination of witnesses. I mean, I

Nathan Dubray-Cross by Jones

1 just -- hire a specialist. I just felt there was numerous
2 different things he could have done to help me to show my
3 innocence.

4 Q. Give us as many examples as you can think of.

5 A. Like I said, cross-examination of witnesses
6 where, you know, you could find Shelby and Mario in a lie;
7 Joe Bull lying. If -- I don't have that many, I guess.

8 Q. Okay. Thank you.

9 MR. MERTZ: I have no further questions.

10 THE COURT: Mr. Jones.

11 **CROSS-EXAMINATION BY MR. JONES:**

12 Q. Let's go back and visit July 15th, 2014,
13 Mr. Dubray. That was the occasion of your change of plea.

14 A. Yes, sir.

15 Q. That was your decision?

16 A. Yes.

17 Q. It wasn't anyone else's decision?

18 A. No, it wasn't.

19 Q. I believe the Court did a pretty thorough job in
20 asking you about that, and one of the questions was
21 whether you had sufficient time to discuss this with your
22 attorneys and whether you were satisfied with your
23 attorneys. Do you recall your response to that question?

24 A. I do not.

25 Q. Well, your response was yes, you were satisfied

Nathan Dubray-Cross by Jones

1 with your attorneys and had sufficient time to discuss
2 this with your attorneys.

3 What's changed between July 15th and now, other
4 than the fact you were sentenced?

5 A. Just the amount of time I got, I guess.

6 Q. All right. You're frustrated with your sentence?

7 A. Yes.

8 Q. I understand that. And the Court gave, and
9 you -- you gave an explanation of the Alford plea, and
10 your understanding of an Alford plea is it comes in when
11 an individual can't really remember what took place and
12 believes the State has sufficient evidence to prove the
13 charges against you. Does that sound about right?

14 A. Yes, it is.

15 Q. Do you remember making statements in your case
16 that, when asked about this, "If I did it, I'm sorry. I
17 don't know"? Do you recall making that statement?

18 A. Yeah, I recall it.

19 Q. All right. Do you recall making the statement,
20 "I don't know if I did it or not. I blacked out"?

21 A. Yes, I do.

22 Q. And you're aware that law enforcement and we were
23 all well aware of your statements along those lines, as
24 was your defense attorneys. You're aware of that?

25 A. Yes.

Nathan Dubray-Cross by Jones

1 Q. Is it true, then, that you, in your change of
2 plea, stated that you were too drunk to remember, would be
3 an accurate statement?

4 A. Yes.

5 Q. Now, let's move ahead to October 4th of 2014,
6 proceeding to sentencing. The Court asked you
7 specifically, "Do you agree whether or not you were
8 pressured by attorneys to plead guilty?" Do you recall
9 your response to that question?

10 A. No, I don't.

11 Q. All right. Your response was you were not
12 coerced. And in a follow-up you said, "I owe it to my
13 children to withdraw my plea," is what you tried to do.
14 What did you mean by that?

15 A. I owe it to them to prove to them that I'm
16 innocent.

17 Q. In spite of the fact that you're on the record at
18 least two times stating you can't remember what happened?

19 A. Yes.

20 Q. Do you remember making the statement to the
21 mother of the child that "If she says it happened, it's
22 probably true"?

23 A. No.

24 Q. All right. Do you remember stating that a child
25 at that age is probably not going to lie?

Nathan Dubray-Cross by Jones

1 A. Yes.

2 Q. All right. Now, you're aware that if a person
3 makes a decision not to go to trial, there's not going to
4 be the presentation of witnesses. That's specifically one
5 of the questions the Court asks you. You're aware that
6 you won't be able to present witnesses?

7 A. Yes.

8 Q. So once you change your plea to guilty, you're
9 arguing to the Court that there was no chance to
10 cross-examine any -- examine these witnesses. You knew
11 that when you entered your change of plea, there's going
12 to be no cross-examination.

13 A. I just thought it would have been done prior
14 to -- I thought it would have been done before I even went
15 to a pretrial.

16 Q. So you thought there was going to be a trial
17 before the trial?

18 A. No. I just thought he would have, you know, took
19 time out of his schedule to talk to these people.

20 Q. You had those copies and discovery provided to
21 you of the individuals that you listed; did you not?

22 A. Yes, I did.

23 Q. Specifically, a statement of Tori Killscrow --

24 A. Yes.

25 Q. -- where, in her statement, she indicated you

Nathan Dubray-Cross by Jones

1 tried to have sex with her prior to the -- that same
2 night? That same morning?

3 A. Yes.

4 Q. Her statement was not relating to factual
5 representation of having observed the allegations that
6 you're before the Court on. It's a separate matter. Do
7 you understand that?

8 A. Yes.

9 Q. In other words, she's not a factual witness to
10 the events involving the eight-year-old child.

11 A. Yes.

12 Q. And I think it's your cousin, Mario Alcon, stated
13 he knew about a prior history?

14 A. Yeah.

15 Q. And we agree he knew about a prior history, but
16 he wasn't stating he saw this incident either, was he?

17 A. No.

18 Q. Neither was the mother of the child, Shelby
19 W. [REDACTED]. But when she confronted you -- do you recall
20 when she confronted you about this?

21 A. Yeah.

22 Q. When was it?

23 A. The morning.

24 Q. Within how much time of you getting up that
25 morning?

Nathan Dubray-Cross by Jones

1 A. She woke me up.

2 Q. Okay. And you're well aware that these
3 allegations are that they would have taken place the 2nd
4 to the 3rd of January, and at some point on that morning
5 you were being contacted by the mother of an eight year
6 old who's very upset with you?

7 A. Yes.

8 Q. What was your response?

9 A. I told her I didn't.

10 Q. I think you cried?

11 A. Yeah. Because -- I started crying, because I
12 didn't -- I didn't know what she was talking about. I
13 went to sleep that morning.

14 Q. So you had a chance to review the forensic
15 interview in this case between Tammy Knudson and the
16 eight-year-old victim, didn't you?

17 A. Yes.

18 Q. You had a chance to review that, either with your
19 attorneys or on your own. I believe a copy was provided
20 to you?

21 A. Yes.

22 Q. So you're well aware that in this case, this
23 eight-year-old child provided this information to her
24 mother within hours of the event taking place. There was
25 no gap in time between her stating what happened -- to her

Nathan Dubray-Cross by Jones

1 mother -- was there?

2 A. I guess not.

3 Q. Her mother is confronting you, in fact, getting
4 you up in the morning and shooshing (phonetic) you out of
5 the house, she's so upset about the whole thing. That's
6 what took place; isn't it?

7 A. Yeah.

8 Q. So where is it that you're saying that somehow or
9 another there would have been some planting of seed or
10 memory issue with regard to mother and child on the events
11 that took place?

12 A. Because I remember all three of us sitting in the
13 living room before I passed out, and there was no
14 awkwardness or any state of confusion coming from either
15 one of us around her mom or to anybody else.

16 Q. Because her mother wasn't aware of what was
17 taking place after that point in time when you're
18 confronted by her?

19 A. I'm sorry. What?

20 Q. Withdraw the question.

21 Did you provide the names of any witnesses to
22 Mr. Hankey that could potentially provide information or
23 insight as to what took place between the 2nd and 3rd of
24 January 2012?

25 A. The only person who could have was Joe Bull, and

Nathan Dubray-Cross by Jones

1 he was a witness for Shelby.

2 Q. And Joe Bull was there and, in fact, was
3 interviewed twice, was he not?

4 A. Yes.

5 Q. And you had those interviews?

6 A. Yes.

7 Q. And Joe Bull's statements had nothing to do with
8 him stating he observed you taking those steps, you
9 molesting the child? He wasn't saying that either, was
10 he?

11 A. No.

12 Q. So what were you going to gain from Joe Bull's
13 statement?

14 A. Just that I was at his house. I was at his
15 house. He knew that me and Monica were arguing. I went
16 to the hospital. Nothing for the allegations, though, I
17 guess.

18 Q. I know that this is somewhat out of context.
19 Because you did enter the guilty plea, and there were
20 going to be some steps taken for you to assist yourself in
21 your sentencing, weren't there? You were going to be
22 going into a treatment -- an outpatient treatment program
23 in Red Wing?

24 A. Yes.

25 Q. That didn't work out, did it?

Nathan Dubray-Cross by Jones

1 A. No, it didn't.

2 Q. You made about five of those anticipated 20; so
3 you were discharged from the program?

4 A. Yes.

5 Q. You didn't help yourself there?

6 A. I tried, but transportation was hard.

7 Q. Okay. You were set up to actually have some
8 assistance with a psychologist down in Fargo, were you
9 not?

10 A. Yes, I was.

11 Q. In fact, I believe a family member assisted, and
12 Mr. Blake Hankey sent a \$2,500 check down to that doctor
13 in order to set up your interview and allow you to obtain
14 that expert opinion and support. Do you recall that?

15 A. Yes, I do.

16 Q. Did you ever meet with that psychologist?

17 A. I did not because of transportation.

18 Q. So you couldn't do it? You couldn't get from Red
19 Wing, or you couldn't get someone else here to assist
20 yourself, in spite of the fact that you were looking at a
21 minimum five years to a possibility of life in prison?

22 A. Yes.

23 Q. Was that your attorney's responsibility to bus
24 you there or to hold your hand getting you there?

25 A. No, I never said it was.

Nathan Dubray-Cross by Jones

1 Q. Your attorneys, as you're well aware, have been
2 in the process of dealing -- and have been licensed for
3 ten plus years in this jurisdiction and dealt with many of
4 these cases. Do you agree with that? Did you discuss
5 that with them?

6 A. Yes.

7 Q. And you're aware that they'd represented
8 individuals under similar circumstances and seen
9 situations where there's been forensic interviews with
10 children?

11 A. Yes.

12 Q. So you have a -- they have a responsibility to
13 you to review all of these things and to give you their
14 considered advice on how to proceed?

15 A. Yes.

16 Q. And you were satisfied with that?

17 A. (No audible response.)

18 Q. Well, you're on the record saying you were
19 satisfied with it.

20 You indicated you maybe had three face-to-face
21 contacts with Mr. Hankey?

22 A. Yeah.

23 Q. Would it surprise you to see that it's about
24 double that and that there are multiple other occasions to
25 attempt to reach you by text, telephone, or letter?

Blake Hankey-Direct by Jones

1 A. Yes.

2 Q. That would surprise you?

3 A. I -- I can't recall how many times we did meet;
4 but, yeah, that does surprise me.

5 MR. JONES: I don't have any further questions,
6 Your Honor.

7 THE COURT: Mr. Mertz?

8 MR. MERTZ: No further questions, Your Honor.

9 THE COURT: Okay. Thank you, Mr. Dubray. You
10 may be seated.

11 (The witness was excused.)

12 MR. MERTZ: Your Honor, I don't have any other
13 witnesses, but I do anticipate cross-examining Mr. Hankey,
14 at least.

15 THE COURT: Okay.

16 Mr. Jones?

17 MR. JONES: State would call Mr. Hankey, Your
18 Honor.

19 **BLAKE HANKEY**, called as a witness, being first
20 duly sworn, was examined and testified as follows:

21 MR. JONES: May I approach the witness, Your
22 Honor?

23 THE COURT: Yes.

24 **DIRECT EXAMINATION BY MR. JONES:**

25 Q. Mr. Hankey, I show you what's been marked for

Blake Hankey-Direct by Jones

1 identification as State's Exhibits 1 and State's Exhibits
2 2. Could you describe for the Court what the substance of
3 State's Exhibit 1 is?

4 A. Yes. It's a billing sheet translated into an
5 Excel form for the purposes of, I guess, today's hearing.
6 But it's indicative of the majority of time my office had
7 on the Dubray case. It's got my time, Mr. Fleischman's
8 time, it's got my paralegal's time. Also has a certified
9 law clerk's time in here as well.

10 Q. All right. And is that an accurate business
11 record?

12 A. (Examining.) It is. The last page would also
13 be -- so the first -- to be accurate, one -- the first
14 four pages are the Excel spreadsheet. The last page are
15 the phone logs we were able to get back from -- from our
16 carrier, which Midcontinent Communications -- we were able
17 to get a spreadsheet.

18 And I guess the reason that not all of these are
19 on the bill log is because if we couldn't get ahold of
20 Mr. Dubray or left a message, we didn't -- we wouldn't
21 bill for that time.

22 Q. So these would be contacts that wouldn't have
23 necessarily went through?

24 A. Some might be on there, some might not. But if
25 we didn't get ahold of him, we didn't charge him.

Blake Hankey-Direct by Jones

1 Q. I show you what's been marked for identification
2 as State's Exhibit No. 2. Can you describe that, please.

3 A. I can. The first five pages are cover letters
4 from my office which was -- which is how our office -- or
5 they're instructed to send out different materials that
6 are received from the State or from another source. Looks
7 like these cover sheets all have somebody else's initials
8 circled other than mine; so...

9 Our office policy is when the materials come into
10 the office, a photocopy is made for the client, a cover
11 letter is generated by the support staff; and before I
12 even see the materials, they're sent off to the client.
13 That's how we do it so they immediately get it. And the
14 first five sheets be indicative of those cover letters.

15 The -- the 6th page would be the treatment center
16 report that my office would have received about
17 Mr. Dubray's treatment.

18 The 7th page, another -- it's a letter from my
19 office to Dr. Benson's office with the retainer amount for
20 the evaluation she was going to do.

21 The next two pages are communications between
22 myself and Stacy Benson's office about trying to set up an
23 appointment for Mr. Dubray to get his evaluation done.

24 That would be -- that would be the remaining --
25 there's some other ones with Dr. Benson directly about the

Blake Hankey-Direct by Jones

1 evaluation.

2 Q. All right. And are those regularly kept business
3 or in the course of your representation of Mr. Dubray?

4 A. They are.

5 MR. JONES: Your Honor, copies have been provided
6 counsel. At this time I would offer. And I did these
7 cumulative rather than go through each page; so I do have
8 them together.

9 MR. MERTZ: I have no objection, Your Honor.

10 THE COURT: Okay. And that's Exhibits 1 and 2?

11 MR. JONES: Correct.

12 THE COURT: Exhibits 1 and 2 are received.

13 Q. (Mr. Jones continuing) Mr. Hankey, I don't want
14 to go through all of this. I think that when we -- when
15 you go through a fair reading of Mr. Dubray's argument, is
16 there's a general argument of ineffective assistance.

17 What he's essentially breaking it down to, I
18 believe, is his allegation or thought that there was a
19 failure to retain an expert as would relate to the
20 forensics interview or assisting him in his behalf.

21 Can you respond to the Court on -- first of all,
22 was an expert hired?

23 A. Only for -- well, was never officially hired, I
24 guess. There was a --

25 Q. -- an attempt?

Blake Hankey-Direct by Jones

1 A. -- an attempt. But, so, no expert was hired, no.

2 Q. And what were the dynamics as relating to the
3 possibility of retaining an expert specifically relating
4 to the Tammy Knudson interview of the victim?

5 A. Right. And I guess before I go -- and I just
6 want to be pretty guarded in what I say right now. I
7 don't believe privilege has been waived in any form at
8 this point. So I can kind of give a general -- my
9 analysis, but I can't go very deep into things.

10 MR. JONES: And I believe that there's -- yeah,
11 it does present an issue, Your Honor. We probably do need
12 to do that if we're going to go into any detail.

13 THE COURT: Mr. Dubray, are you willing to waive
14 your attorney/client privilege with Mr. Hankey?

15 NATHAN DUBRAY: Sure.

16 THE COURT: Okay. Then, we'll go ahead, and I'll
17 allow you to answer the --

18 MR. HANKEY: Okay.

19 THE COURT: -- questions.

20 A. You know, I guess the long answer is I looked at
21 the video; Mr. Fleischman looked at the video. You know,
22 I don't know an exact number, but I've handled numerous
23 cases like this.

24 The one that really stands out to me is a federal
25 case I had, and it's to this day the one trial that I lost

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1 that I really firmly believe my client was innocent, and I
2 should have won.

3 And so I guess I'm familiar with, you know, what
4 a known sample is of an appropriate way -- at least what I
5 believe is an appropriate way to interview a child
6 witness. It seemed like Ms. Knudson handled everything
7 appropriately. Didn't see a need to get another witness.
8 I guess one of the things that I don't try and do is spend
9 money needlessly that doesn't need to be there. I didn't
10 see a need.

11 My recollection of the interview and conversation
12 with Mr. Dubray was the child witness was in a room alone
13 with Ms. Knudson. She wasn't asked leading questions.
14 She was actually giving descriptions as to what was
15 happening. She described what Mr. Dubray had done: was
16 touching her bottom, which she indicated was her vagina or
17 vaginal area, and that, you know, I mean, she described in
18 pretty good detail. And I guess my position was I didn't
19 need to get an expert.

20 And, you know, quite frankly, there had been a
21 lot of money expended, and, I mean, I know the source of
22 the money was coming from my client's father-in-law, and I
23 wasn't going to take money that didn't need to be spent.

24 Q. (Mr. Jones continuing) When you review this
25 question of a need, one of the factors is how soon or how

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1 the timing of the reporting of an incident to a parent, to
2 a law enforcement, to a doctor, to a teacher?

3 A. Right. And that's really something that we
4 looked into, and it was -- you know, it was reported the
5 morning it happened. My recollection is Mr. Dubray was
6 woken up on the couch by the child's mother, the -- either
7 morning or early afternoon. I think it was about noon.

8 Q. Was there any time lapse that you were aware of,
9 then, between the report of the victim to the mother?

10 A. No. To my knowledge it was pretty instantaneous.

11 Q. You've had an opportunity, and I believe that,
12 along with and showed to, Mr. Dubray had the same
13 opportunity to review the video of Ms. Knudson's
14 interview.

15 A. Yes, he was given a copy, and I know -- I can't
16 say that I remember sitting down and reviewing the video
17 with Mr. Dubray, but I know Mr. Fleischman did. We had a
18 conversation about that, and I know that Mr. Dubray and I
19 did speak about the video. I don't think that him and I
20 personally reviewed it, but I know we spoke of it, and I
21 know he reviewed it with Mr. Fleischman.

22 Q. Is it safe to say that, in spite of that fact in
23 making a professional judgment on whether there would be
24 anything to be gained by bringing in an expert, that
25 wouldn't have prevented you from a vigorous

Blake Hankey-Direct by Jones

1 cross-examination of Tammy Knudson should the matter have
2 went to trial?

3 A. No. And, you know, pretty candidly, that's kind
4 of where I hang my hat as a defense attorney and what I
5 try and do, and I try to do a zealous cross-examination
6 every time that I do, and I would have prepared -- well,
7 in fact, quite frankly, we were getting pretty close to
8 trial. We were already full in trial prep. I had met
9 with Mr. Dubray about trial prep, and we were ready to go.

10 Q. You had a chance, then, also to review the
11 documentation from Dr. Arne Graff?

12 A. Yes.

13 Q. And was that consistent with what had been
14 provided you through the Tammy Knudson interview and the
15 statements of the witnesses?

16 A. Yes.

17 Q. As far as trial preparation is concerned, this
18 was a case where we actually went so far as to do a jury
19 questionnaire. Whose idea was that?

20 A. Mine.

21 Q. And do you recall how extensive that
22 questionnaire was?

23 A. I don't. But in these types of cases, I
24 generally like to do it when there's a child victim
25 involved. Because it's pretty difficult, in my prior

Blake Hankey-Direct by Jones

1 experience, to pick a jury and ask the questions, and it
2 gets pretty sensitive; so that was something that I
3 wanted.

4 Q. Had you discussed prior bad acts with Mr. Dubray?

5 A. I had. And, you know, it was my opinion the
6 State couldn't use that evidence against him unless we
7 opened the door. So when we were prepping his testimony,
8 one of the questions that -- or one of his answers was --
9 and I remember this vividly -- "I would never do that."

10 Well, guess what? There's other prior bad
11 incidents. And I would have tried to keep out the other,
12 and still, in my opinion, I probably could have kept that
13 out. But he had to be very selective in how he answered
14 questions so that evidence couldn't be brought in.

15 Q. And to bring it in there would have -- there
16 would have likely been a motion in limine, and the Court
17 would have made a decision?

18 A. Right. Right. But the crux of where I was going
19 with Mr. Dubray was we can't open the door. So we can't
20 say, "I would never do this," when there's one prior --
21 even though it's a juvenile conviction -- another prior
22 allegation out of Minot.

23 Q. In this case, there were plea negotiations with
24 the State prior to the pretrial conference, and I believe
25 a cover letter was sent and is part of Exhibit 2. Did you

Blake Hankey-Direct by Jones

1 have a recommendation to your client on whether or not to
2 accept the plea offer made by the State?

3 A. At that point in time, in my communications with
4 Mr. Dubray leading up to that point, it was to reject that
5 offer.

6 Q. And why was that?

7 A. I guess I honestly can't remember.

8 Q. When the change of plea took place on the 15th of
9 July, how much lead time did you have? When did you first
10 become aware that your client was going to or sought in
11 his interest to change his plea?

12 A. We -- well, it had been something that Nathan and
13 I had talked about, you know.

14 And I guess there's a little more of a back
15 story. Nathan was difficult to get ahold of. I mean, the
16 Court can see with what's been provided, the communication
17 we did have. There would be lapses in time where we would
18 have very little communication. And so, you know, I guess
19 our office went as far as texting and trying those kind of
20 means to get ahold of him.

21 And so, you know, as far as sitting down and
22 talking with him about the case and how to proceed, you
23 know, the couple times that I vividly remember were
24 sitting down, going through the discovery with him and
25 talking about the weaknesses of our case, which I always

Blake Hankey-Direct by Jones

1 do.

2 I mean, I think we're -- I wouldn't do my clients
3 a service if I just said it was all rosy and just, we had
4 a great case; they can't prove it.

5 So we did go over the statements that he made.
6 We did go over, you know, the discovery materials, what
7 was weak on our side.

8 Q. And I'll just -- in your professional judgment,
9 was there a significant risk factor in trial?

10 A. There is. Especially given the stakes and, quite
11 frankly, this judge. I mean, we -- if -- you know, I
12 mean, there's been some pretty hefty sentences that have
13 come down with a loss at trial, and I think that's an
14 important factor to consider, you know, in all my clients.
15 Not that I recommend "plead guilty" if that's not what you
16 want to do.

17 But, you know, the day of the change -- I think
18 it was the day of the change of plea, it was Nathan,
19 Mr. Fleischman, Mr. McCarthy, and myself in a conference
20 room just right by Judge Jahnke's courtroom, and we sat in
21 there for a while.

22 And Mr. McCarthy, to avoid trial, wanted a chance
23 to just speak with all of us and say, "Here's why I think
24 I can prove my case." And not many prosecutors do that,
25 but I -- quite frankly, I like it because it gives me a

Blake Hankey-Direct by Jones

1 nice snapshot into what the State is trying to prove or
2 what they think their case is, and it helps me attack it.

3 And, I guess, after that meeting we had a chance
4 to further talk, and it was at that time, then, that
5 Mr. Dubray made up his final determination, after speaking
6 with Mr. Fleischman, myself, alone, without Mr. McCarthy
7 there, as to what -- how we were going to proceed.

8 Q. Did you in any way try to force Mr. Dubray to
9 make a trial decision?

10 A. No. I mean, that's not the way I practice law
11 at all.

12 I guess I can't remember specifically what I said
13 to him, but standard, what I tell all my clients is, "It's
14 your decision. Here's the negatives. Here's the
15 positives. And, you know, ultimately it's up to you."

16 "And, you know, I'll go to trial, but if we go to
17 trial and lose, these are the negatives. If we go to
18 trial and win, you walk out of here with nothing."

19 And so --

20 Q. Would it be accurate -- an accurate statement
21 that that decision, then, did lead you to make a different
22 type of argument at sentencing, which included acceptance
23 of responsibility and included arguments as to -- while
24 not a legal defense -- putting into play the intoxication
25 and the blackout circumstance?

Blake Hankey-Direct by Jones

1 A. Right. That was part of the problem with the
2 case and why we did an Alford plea. I don't do those very
3 often in my practice, but this is a case where there was
4 no other choice but to proceed, you know, in that manner.

5 And so that was part of the consideration why we
6 were going to get Dr. Benson involved, why we were going
7 to do -- you know, we were going to do a psychosexual
8 evaluation on Mr. Dubray to, you know, make determinations
9 as to his risk factor and how it can be, you know,
10 treated, etcetera, to try to limit the exposure he had.

11 Q. In your estimation in either Dr. Graff's or Tammy
12 Knudson's interviews with the -- this juvenile victim, did
13 you see evidence of leading questions or tainting?

14 A. No.

15 Q. You've done similar cases and have seen where
16 you've made the argument that has taken place, in your
17 estimation?

18 A. I've not done a trial on that issue, but I've
19 seen similar cases where I've used that in negotiations or
20 things like that. But I've not had a trial -- if that's
21 your question, I have not had a trial where I've raised
22 that, but I've had similar cases where I've seen it.

23 Q. Were you aware of whether or not Mr. Dubray was
24 ever seen by Dr. Benson?

25 A. Never.

Blake Hankey-Cross by Mertz

1 Q. So what happened to the \$2,500?

2 A. It was -- I think it was returned to Mr. Bird
3 Bear.

4 MR. JONES: I don't have any further questions,
5 Your Honor.

6 THE COURT: Okay. Mr. Mertz, you may
7 cross-examine.

8 MR. MERTZ: Thank you, Your Honor.

9 CROSS-EXAMINATION BY MR. MERTZ:

10 Q. Mr. Hankey, were you retained or appointed in
11 this case?

12 A. I was retained.

13 Q. Okay. I've looked through the file I received in
14 this case and the Court's records. I could not find that
15 the State had made a formal 404(b) notice in this case.
16 Was there a 404(b) notice concerning these prior bad acts?

17 A. To my recollection there wasn't, and that
18 was what I was talking about with Mr. Jones. Just, we had
19 to be careful in Nathan's testimony not to open up the
20 door about prior -- other prior incidences. And that's --
21 to my recollection, that's why I thought I could
22 potentially keep those out.

23 I don't rec -- remember the State ever making
24 one.

25 Q. And, by the same token, you did not file any kind

Blake Hankey-Cross by Mertz

1 of a written motion in limine to get a pretrial ruling
2 about preventing State's witnesses from talking about
3 these other allegations, did you?

4 A. No.

5 Q. And why not?

6 A. Well, I guess there's no indication that they
7 were ever going to be used unless we opened the door. So
8 that's where I was -- what I was thinking is they -- the
9 State is not trying to use them, then, great, they're not
10 going to use them. And I wanted to be careful that Mr.
11 Dubray didn't open up the door on his testimony so they
12 could be brought in.

13 Q. Have you, in other cases, filed motions in limine
14 to keep out prior bad acts evidence?

15 A. I have when I had the indication that the State
16 would be using that evidence.

17 Q. Did you discuss with Mr. Dubray his position
18 concerning those allegations of prior bad acts?

19 A. We discussed it, and he gave a pretty similar
20 explanation to me as he gave on the stand.

21 Q. Okay. So you knew that he was denying that
22 those -- that he had actually engaged in that behavior?

23 A. Right.

24 Q. Did the State give you notice that they were
25 going to call expert witnesses in this case?

Blake Hankey-Cross by Mertz

1 A. Yes.

2 Q. And what were those expert witnesses, and what
3 was the purpose of them?

4 A. Oh, my recollection is they were going to call,
5 oh, the person that did the forensic interview, Tammy
6 Knudson, to, I guess, testify to, you know, how she
7 conducted the interview. You know, I guess that was my
8 understanding. And I had the interview, I guess, and a
9 transcript of it.

10 And also Dr. Graff, I believe, was going to be
11 called as well. I can't -- it's been a while. I can't
12 right now think of what he exactly was going to testify
13 to. I believe I was given a CD and a disclosure.

14 Q. Was there a pretrial hearing concerning the
15 admissibility of hearsay evidence in this case under the
16 rules?

17 A. There -- there wasn't, but, again, I was of the
18 opinion I could keep hearsay out. It wasn't -- wasn't a
19 party. It wasn't -- you know, he had a right to confront
20 his accusers. I believe the eight year old would have had
21 to testify, and I would have fought to keep all the
22 hearsay evidence out.

23 Q. Okay. But there's a rule that requires the Court
24 to conduct a pretrial hearing concerning potential hearsay
25 evidence in a child sex abuse case.

Blake Hankey-Cross by Mertz

1 A. Correct.

2 Q. Was there such a pretrial hearing in this case?

3 A. No, there wasn't.

4 Q. Okay. Did you have Nathan Dubray privately take
5 a polygraph?

6 A. I didn't.

7 Q. Okay. Have you ever done that in defending a
8 case?

9 A. A few times.

10 Q. Okay. In this particular case, in reading the
11 record including -- up to and including the sentencing,
12 there was some implication that Nathan was suffering from
13 a selective memory. He remembered parts of the night
14 and -- but he claimed he didn't remember molesting this
15 child --

16 A. That's correct, yes.

17 Q. -- is that accurate?

18 A. Yes, it is.

19 Q. Okay. And it's my understanding that you did not
20 hire a private investigator, did you?

21 A. No.

22 Q. And you did not conduct any depositions of
23 anyone?

24 A. Did not.

25 Q. Okay. And you didn't personally or have someone

Blake Hankey-Cross by Mertz

1 in your staff interview any of the witnesses?

2 A. No.

3 Q. Okay. Now, when would you do that in a -- you
4 know, this is a -- correct me if I'm wrong -- a double A
5 felony, two counts. When would you hire an investigator
6 in a case, for example?

7 A. If I believe the witness credibility was at
8 issue, there was some loose ends, something that needed
9 answers to. And in this case, I didn't believe one was
10 necessary.

11 Q. And why was that, sir?

12 A. There was only two people there at this incident,
13 two people who knew what was going on. We have an eight
14 year old and Mr. Dubray and, then, the other witnesses. I
15 didn't believe, in my professional judgment, anything
16 could be gleaned by having a private investigator.

17 Q. Okay. Would that also apply to depositions?

18 A. Correct.

19 Q. Did you contemplate deposing the child?

20 A. No. No, I did not.

21 Q. Have you ever deposed any victims in sexual
22 assaults or GSI cases in your practice?

23 A. I haven't.

24 Q. You've never deposed the victim?

25 A. I haven't.

Blake Hankey-Cross by Mertz

1 Q. Okay. Mr. Hankey, you were prepared to go to
2 trial. You were preparing to go to trial, and your client
3 pled guilty on the eve of trial. Would you tell the Court
4 what your theory of defense would have been in this case
5 had you tried the case.

6 A. We would have had -- I mean, I can't tell you
7 exact theory. I can tell you what I would have done. I
8 guess, you know, we would have attacked the credibility.

9 We would have -- and I guess prepping Nathan, he
10 would have had to be just rock solid on the stand and that
11 was what -- the crux of what we were going to do.

12 And, I guess, viewed it as a "he said, she said"
13 type of a case.

14 We've got, you know, Nathan, and we had to be
15 careful on what he said so negative things couldn't come
16 in against him.

17 His testimony versus the eight year old. Went
18 through in detail with Nathan about how -- what does she
19 have against you? Why is she lying? Why would she make
20 this up?

21 I guess the response that I received was that she
22 didn't -- that she didn't like -- when I'm talking about
23 the mother here, didn't like -- Nathan didn't like the new
24 boyfriend of who Shelly was dating; so that might be an
25 indication as to why she might be out to get him.

Blake Hankey-Cross by Mertz

1 But, really, you know, Nathan wasn't able to come
2 up with much to give me as far as why this family would be
3 out to get him, why this girl would be making this up.

4 So, you know, that was our theory is that we were
5 going to try to say that for some reason the family was
6 mad, making this up, and Nathan had to be, you know, rock
7 solid on the stand. That's --

8 Q. But -- and we're talking about the child's
9 mother, Shelby.

10 A. I think it's Shelly.

11 NATHAN DUBRAY: Shelby.

12 MR. HANKEY: Shelby? Okay. Sorry.

13 Q. (Mr. Mertz continuing) But -- okay. So would
14 you agree that it's extraordinarily difficult to
15 effectively cross-examine a child, a small child?

16 A. I would disagree. Treat it a little bit
17 differently, but, I mean, it's easier on cross-examination
18 because you can ask them leading questions.

19 Q. Well, I understand. But do you recognize the
20 difficulty of basically attacking a child in front of a
21 jury?

22 A. Right. And, I guess, I've had to do it before.
23 I just need to use a different approach. I don't think
24 it's difficult, though.

25 Q. But you didn't see a need to depose the mother,

Blake Hankey-Cross by Mertz

1 Shelby. If you were going to present a theory of defense
2 that someone coerced or coached this child into making
3 this up -- you know, somehow either she's telling the
4 truth or she's making it up; right?

5 A. Right.

6 Q. Okay. But you didn't see a need to depose Shelby
7 to ask those specific questions?

8 A. No, I didn't. You know, a lot of times in these
9 cases I like to keep things close to the vest. And I've
10 been burned by having prelims and having witnesses, and
11 then we get to the trial, and all of a sudden they've had
12 time to prepare; the State's had time to prepare.

13 And no. It was actually never a consideration.
14 It wasn't an afterthought. It was that it was just never
15 a consideration. The first time that I wanted to attack
16 or I wanted it to be here in front of the jury, if that's
17 the route we were going.

18 Q. What would you base your questions on? I mean, I
19 don't understand. If you have no idea how she's going to
20 respond to your theory that she somehow coaxed this child,
21 what would you base your questions on, Mr. Hankey?

22 A. So your question is my theory was she somehow
23 coaxed the child?

24 Q. Right. Right.

25 A. "Isn't it true you're dating" -- I forget the

Blake Hankey-Redirect by Jones

1 guy's name. "Nathan didn't like that, did he?"

2 Q. Okay.

3 A. And, you know, I mean, that would have been what
4 I would have done. And then --

5 Q. Okay.

6 A. -- Nathan would have had to testify to his
7 version of it but...

8 Q. Okay.

9 A. I guess I didn't want to give her or the State
10 any indication as to where we were going, because that
11 door probably very well would have been closed by the time
12 of trial.

13 Q. Okay.

14 MR. MERTZ: Thank you, Your Honor. That's all I
15 have.

16 THE COURT: Okay. Mr. Jones.

17 MR. JONES: Just a couple of follow-ups.

18 **REDIRECT EXAMINATION BY MR. JONES:**

19 Q. First of all, on the issue of prior bad acts. Is
20 it accurate that a great deal of that came from the PSI
21 and not from other information, other than, I believe,
22 there was a reference by Alcon, Mario Alcon?

23 A. True. And there was -- I had no indication the
24 State was going to try to use it.

25 Q. Correct. And it would be your practice, if it

Blake Hankey-Redirect by Jones

1 were to come out, there'd be a motion or -- a motion in
2 limine, or you would have dealt with it at trial?

3 A. Right.

4 Q. You're aware that intoxication or -- can present
5 a serious problem with polygraph testing?

6 A. Well, right. The theory was, you know -- I mean,
7 well, shouldn't say "the theory," but, I mean, Nathan's
8 statement was that he didn't remember; so I don't know
9 what a polygraph would have done.

10 I mean, that's, you know -- and in my normal -- I
11 don't know if it was in this case, but normally I'll ask
12 the State, "Hey, if my client takes some passes of
13 polygraph, will you give it consideration?" And on double
14 A felonies, I guess, I don't remember a case where it's
15 been given much consideration by the State but --

16 Q. And you're aware that it's generally not even
17 offered or in consideration in instances where there's
18 blackout-type conditions?

19 A. Right. And I have a polygraph guy, it's Rollie
20 Rust, to do all my independent polygraphs. It's a tool
21 that I do utilize, but in this case I didn't think it was
22 worthwhile to do it.

23 Q. Would it be accurate to say that a lot of this
24 comes down to trial strategy?

25 A. Yeah, I think a hundred percent on a case like

Blake Hankey-Recross by Mertz

1 this.

2 Q. And you'd had a chance to view -- review this
3 uncomfortable situation between Shelby W. [REDACTED] and
4 Mr. Dubray. This was something you discussed with your
5 client, was it not?

6 A. Yes.

7 Q. And that he was well aware that that would have
8 been one of the angles, one of the things that you would
9 have inquired in in examination or cross-examination?

10 A. Oh, absolutely. We had to attack the credibility
11 of her, and that's why, you know, the conversation was
12 had: "Does she have something against you? Does she not
13 like you? Is she trying to get back at you?"

14 And, you know, that's when the thing about the
15 boyfriend came up that, you know, he didn't like, and
16 there was an issue between them now, and so that
17 conversation came about.

18 Q. Okay.

19 MR. JONES: I don't have any further questions,
20 Your Honor.

21 THE COURT: Anything further, Mr. Mertz?

22 MR. MERTZ: A little follow-up, Your Honor.

23 Thank you.

24 **RECROSS-EXAMINATION BY MR. MERTZ:**

25 Q. Mr. Hankey, would you agree that to be effective,

Blake Hankey-Recross by Mertz

1 especially in a jury trial, that you have to present -- to
2 be successful and effective, you have to try everything in
3 your power to present a credible theory to the jury? You
4 have to be credible with them?

5 A. Right. I mean, yeah. Yes.

6 Q. Okay. And to go -- just to go back to the
7 polygraph as a prep tool or a defense tool, Mr. Dubray
8 would have had trouble on the witness stand because of the
9 perception that he was experiencing a selective memory,
10 wouldn't you agree?

11 A. He would have.

12 Q. Okay. And so the issue of whether or not he
13 actually remembered or didn't remember. That would be the
14 point of the polygraph, did he actually remember what he
15 did, or didn't he remember? As a defense attorney, you
16 would want to know if he was telling you the truth.

17 A. Yeah, I can see that side of it. Sometimes,
18 quite frankly, I don't want to know. I mean, it's --
19 it's -- it's -- I mean, if our defense is call him to the
20 stand and testify, if I know he's going to be lying, I
21 can't call him as a witness --

22 Q. Right.

23 A. -- so --

24 Q. Right.

25 A. -- I mean, it gets to be a slippery slope.

Blake Hankey-Recross by Mertz

1 Q. But, yes, but giving him effective and wise
2 counsel or, you know, effective counsel, pretrial, part of
3 it is being the devil's advocate. You've already
4 talked --

5 A. Yeah.

6 Q. -- about that --

7 A. Yeah.

8 Q. -- right?

9 A. Oh, absolutely. Yeah.

10 Q. You have to spend a lot of time with the
11 defendant showing the strengths of the prosecutor's case,
12 would you agree?

13 A. Yes.

14 Q. And the weaknesses of your theory of defense?

15 A. Correct.

16 Q. Okay. So you would rather not put a defendant on
17 the witness stand when the story he's going to tell is
18 just going to get shot all full of holes; right?

19 A. True.

20 Q. Okay.

21 A. Yeah.

22 Q. And part of your job as the defense attorney is
23 to point out, basically, some of the fallacies that your
24 defendant is advocating to you in your conversations with
25 him?

Blake Hankey-Recross by Mertz

1 A. Correct. Yeah.

2 Q. Okay.

3 A. I agree with that.

4 Q. Okay. Thank you.

5 MR. MERTZ: No further questions.

6 THE COURT: Mr. Jones?

7 MR. JONES: No, Your Honor.

8 THE COURT: Thank you, Mr. Hankey.

9 (The witness was excused.)

10 THE COURT: State have any further witnesses?

11 MR. JONES: No, Your Honor.

12 THE COURT: Mr. Mertz, do you have any further
13 testimony?

14 MR. MERTZ: No, Your Honor. Thank you.

15 THE COURT: Okay. Then, were the parties going
16 to brief this any further or...

17 MR. MERTZ: Leave that up to you, Your Honor.
18 I'll do whatever you'd like.

19 THE COURT: It really doesn't matter to me.

20 MR. MERTZ: We could do a brief closing argument
21 or --

22 THE COURT: That will work.

23 MR. MERTZ: Okay.

24 THE COURT: You may go ahead.

25 MR. MERTZ: Well, Your Honor, I know you can tell

1 from my questioning, you know, where we're going with
2 this.

3 Mr. Dubray specifically -- you know, he was
4 facing two double A felonies with the possibility of life
5 without parole, and I would suggest that he would have a
6 right to expect his attorney to leave no stone unturned.

7 And we know that Mr. Hankey, you know, didn't
8 hire an expert, didn't hire an investigator, didn't
9 hire -- didn't do any depositions, didn't interview any
10 witnesses. He basically went off of the prosecutor's
11 discovery and, you know, his analysis of that discovery
12 with his client.

13 I do appreciate the detailed time records that
14 were introduced. They were obviously very useful for this
15 Court. And I was -- I just saw it now this morning, and I
16 was trying to total up how much time Mr. Hankey recorded
17 that he spent with Mr. Dubray pretrial. It's not
18 insignificant.

19 I came up with about 11.3 hours right up to and
20 including the date of the plea, which included the
21 conferences that he talked about on the eve of trial, two
22 hours spent visiting with the prosecutor and with
23 Mr. Dubray. But 11 hours out of 60-some for two double A
24 felonies.

25 I also think there's -- there is a problem with

1 these prior bad acts that were basically used, in a sense,
2 to persuade him to plead guilty. Now we're hearing that
3 there was no fear that they would come in; but, again,
4 there was no motion in limine, which I view as a problem.

5 I certainly can't -- I'm not going to testify,
6 Your Honor, but there are aspects of this that I would
7 suggest, based on your experience, what you've seen in
8 similar cases leading up to this --

9 You know, I pressed Mr. Hankey initially on, you
10 know, "What was your theory of defense? We're on the eve
11 of trial. What's your theory of defense?" And he
12 initially couldn't articulate it.

13 Then, later on, we were discussing the issue of,
14 you know, trying to undermine the credibility of the
15 child. I would respectfully disagree with Mr. Hankey. I
16 think it's extraordinarily difficult to cross-examine a
17 child in a sexual assault case, because I've even written
18 an article on it. It's -- if you attack a young child in
19 front of a jury, I think you risk -- you have this
20 tremendous risk of alienating the jury.

21 So I think you do have to attack the adults
22 around the child. And the mother would be the clear
23 subject of that, and there was no deposition of the
24 mother, and there was no interview of the mother; so
25 you're going to trial basically blind. You don't know

1 what she's going to say.

2 You know, you could ask her, "Isn't it true that
3 Mr. Dubray didn't like your current boyfriend?" And she
4 could have simply said, "Oh, no, that wasn't a problem."
5 And Mr. Hankey wouldn't know she was going to say that
6 until she was on the witness stand in front of the jury.

7 I think there are some severe gaps in trial
8 preparation here and in -- and in -- and ineffective
9 representation of Mr. Dubray.

10 I know, Your Honor, when Mr. Dubray came for
11 sentencing -- you know, I had the transcripts prepared,
12 because I wanted to know exactly what was said and what
13 went on, and Mr. Dubray indicated a desire to withdraw his
14 pleas.

15 You left the door open for a motion that could be
16 briefed and heard at a later date. You chose to go on
17 with sentencing, but you left the door open. I looked in
18 the record. There was no such motion.

19 So we're left with an individual who feels that
20 he was not adequately represented or advised and that that
21 deprived him of his sacrosanct right to have a trial by
22 jury.

23 And Mr. Dubray brought this action, as you well
24 know, believing that he was ill-advised and that he did
25 not receive effective assistance, and therefore he's

1 asking that you would vacate the judgments and we go back
2 into a pretrial mode, would be my understanding at that
3 point.

4 Thank you, Your Honor.

5 THE COURT: Thank you.

6 Mr. Jones?

7 MR. JONES: Thank you, Your Honor.

8 First of all, with regard to the expert issue,
9 just to quickly reiterate on this, there's no allegation
10 and there's no inference in this case that there was any
11 gap in the incident and the reporting of the incident.

12 There's no issue of tainted memory. There's no
13 issue that's been presented that would indicate this
14 eight-year-old girl was somehow inconsistent with her
15 statements both with Tammy Knudson and Dr. Graff. There's
16 just simply nothing there to state that it was planted or
17 tainted.

18 Mr. Dubray would have us take a situation as he
19 would like it, rather than as the facts actually are
20 presented. Quite frankly, the biggest problem Mr. Dubray
21 has in this case is Mr. Dubray. And it's his own
22 statements; it's his own reactions; it's his own responses
23 to the mother, to law enforcement, and to questioning in
24 this case.

25 He presented a situation where it was going to be

1 extremely difficult for any defense to present him other
2 than as having stated, "I don't remember what happened,
3 but it could have happened." That's the facts that we
4 have.

5 When we look at the witness statements on this,
6 they're not there as factual from the standpoint of having
7 observed what took place, but they're internally
8 consistent with what took place.

9 As far as the prior bad acts or prior incidences,
10 I'm not aware of anywhere in the case where it would have
11 been the State's intent to bring it in. One was a
12 juvenile act. I don't know how it would come in anyway.

13 The second is it just simply wasn't presented. I
14 believe the concern would have been, and it's an active
15 concern, that when you hit sentencing, if found guilty,
16 it's an extraordinarily important matter to take into
17 consideration.

18 It was taken into consideration, and it was a
19 manifestly serious issue that needed to be addressed, and
20 by addressing it, I think the Court took all of this into
21 consideration and acceptance of responsibility.

22 And I believe in your sentencing you specifically
23 referred to those issues, that you were going to look at
24 that. I believe one of your statements was, yeah, you
25 don't believe that he planned this; however, there was

1 intoxication, and that's what took place.

2 What we have in addition to that is what comes
3 down to trial strategy, and that's a factor that is always
4 going to be pertinent in a case like this. We've seen 'em
5 many times.

6 I know that the defense, in cases like this,
7 often times take a position of, "I don't want to show my
8 cards on it, because if I show my cards, the State's gonna
9 go find two witnesses to deal with it."

10 We sometimes call it, not very kindly, a defense
11 by ambush. But the reality is that's what it is. We deal
12 with it all the time.

13 What we're here for, and I think essentially what
14 it all boils down to, the polygraph's a red herring.
15 Polygraphs have no efficacy if an individual is seriously
16 impaired. You can't say what's part and what's not part
17 true or accurate. They're just very rarely offered in a
18 case of that degree of intoxication where an individual
19 says he can't remember.

20 We're here because -- and I believe this is a
21 paraphrase of Mr. Dubray's statement in response to one of
22 my questions -- we're here because he didn't like the
23 sentence, and that's really what it boils down to.

24 There was no error. We don't show that a
25 prejudice, in terms of what the trial strategies of

1 Mr. Hankey in his office were, negatively impacted
2 Mr. Dubray.

3 The Court is well aware and can take judicial
4 notice of the fact Mr. Hankey is anything if not zealous
5 in his representation and going to trial. He doesn't
6 shirk from that responsibility, and he didn't here. He's
7 retained in this case; so, if anything, he had even a
8 greater incentive to go to trial in a case like this.

9 We just simply don't see that. We don't see that
10 the burden has been met. We would rely on our brief with
11 regard to the specific laws would relate to this. We
12 don't show that the two prongs have been met in this case,
13 and we believe that the motion should properly be denied.

14 THE COURT: Mr. Mertz, anything further?

15 MR. MERTZ: No. Thank you, Your Honor.

16 THE COURT: Okay. I will give you a written
17 decision on this case.

18 MR. MERTZ: Thank you.

19 THE COURT: Okay. Thank you.

20 And I can't remember the transport order. Did it
21 say for the sheriff to return him when this was done?

22 MR. MERTZ: That -- my orders pretty much always
23 say that. I'm confident it does.

24 THE COURT: Okay.

25 MR. MERTZ: If it doesn't for some reason, I'll

1 submit one to you.

2 THE COURT: Okay. I just didn't look at it. So
3 I'll just notify the clerk that they can let the sheriff
4 know he can be transported back.

5 MR. MERTZ: Thank you, Your Honor.

6 THE COURT: Okay. Thank you.

7 This hearing is adjourned.

8 (The proceedings were concluded at 12:26 p.m.)
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CERTIFICATE OF COURT REPORTER

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF GRAND FORKS)

I, Marsha Allmaras, a duly appointed official
court reporter,

CERTIFY that I recorded in shorthand the foregoing proceedings had and made of record at the time and place indicated.

I FURTHER CERTIFY that the foregoing and attached
59 typewritten pages contain an accurate transcript of my
shorthand notes then and there taken.

Dated at Grand Forks, North Dakota, this 1st
day of February, 2015.

Marsha Altman

Marsha Allmaras
Official Court Reporter

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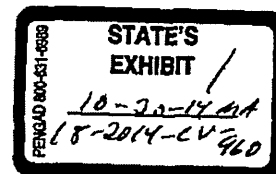
Dubray, Nathan		Opened September 2012		
Date	Initials	Job	Time	Postage
9/16/2012	BDH	Intake with nathan dubray, no charge. (1)	1	
9/25/2012	BDH	TC from client's father-in-law	0.2	
9/25/2012	JLC	Opened file, drafted discovery demand, notice of appearance, certificate of service, sent copies to client.	1	
9/26/2012	ALF	Ct. Appearance - ITV from Jail. Initial Apperance/Bond Setting	0.5	
9/26/2012	ALF	Met with Client @ GFCCC to discuss Int. (2)	1	
9/26/2012	BDH	App/bond	0.2	
9/27/2012	ALF	TC to State's Attorney	0.2	
9/28/2012	BDH	Met with Client @ GFCCC to discuss Int. (3)	0.2	
10/4/2012	ALF	App/bond	0.5	
10/4/2012	AN	TC from Client	0.2	\$0.45
10/4/2012	BDH	Letter to client	0.2	
10/4/2012	BDH	TC from Roger Birdbear	0.2	
10/5/2012	ALF	TC to State's Attorney	0.2	
10/8/2012	ALF	TC with Burleigh County State's Atty. Re: provation revocation cases.	0.2	
10/8/2012	AN	Review discovery materials provided by state's attorney.	0.4	
10/8/2012	AN	Discovery to Client	0.8	Jail
10/9/2012	BDH	Letter to Client (Supplemental)	0.2	Jail
10/10/2012	ALF	Bond Hearing	0.5	
10/10/2012	ALF	Mtg with client and assistance @DMV (4) obtaining driver's license.	0.7	
10/10/2012	LCR	Discovery Review	0.3	
10/11/2012	LCR	Discovery Review	0.7	
10/14/2012	LCR	Discovery Review	3	
10/15/2012	LCR	Discovery Review	0.8	
10/16/2012	LCR	Discovery Review	0.8	
10/18/2012	BDH	Discovery Review, including video.	4.2	
10/18/2012	ALF	Met with Burleigh County Assistant State's Attorney re: outstanding warrants in probation cases.	0.5	
11/1/2012	ALF	TC with Monica Dubray & Roger Birdbear to locate Nathan. Attend hearing re: outstanding bench warrants & probation reovation (Nathan not present). Met with Community Service Supervisor re: verification of completion of community service & payment of fee.	1	
11/1/2012	ALF	Travel time back to GFK	3.8	

FILED IN THE OFFICE OF
CLERK OF DISTRICT COURT
GRAND FORKS COUNTY, N. DAK. ON

OCT 21 2014

REBECCA ABSEY, CLERK

Deputy



EXHIBIT

tabbles

12

33

	Met with client before court appearance for arraignment and entering not guilty plea. (5)		
12/4/2012 ALF	Went to Court Hearing (Arraignment)	0.5	
12/10/2012 AN	Letter to client w/ notice of hearing	0.1	
12/20/2012 AN	Phone Call	0.1	
1/3/2013 AN	Copy of Plea Agreement to client.	0.1	\$0.45
1/4/2013 ALF	View DVD of child victim interview.	1.3	
1/7/2013 ALF	Reviw police reports of discovery docs - prep for client meeting.	0.5	
1/9/2013 ALF	TC with Roger Birdbear	0.1	
1/10/2013 ALF	OC w/ Client, Roger Birdbear and Blake. Attend Ct. Appearance - pretrial hrg w/ blake (6)	1.6	
1/10/2013 AN	Letter to Client w/ supplemental information	0.2	\$0.45
1/10/2013 BDH	Met with client/ Pretrial Hearing (7)	1	
1/15/2013 AN	Letter to Client	0.2	\$0.65
1/24/2013 AN	Letter to client: Order granting motion to amend information and order granting motion to seal.	0.2	\$0.45
1/24/2013 LCR	Discovery Review	0.3	
1/25/2013 AN	Letter to Client	0.2	\$0.45
2/11/2013 BDH	Email to state's attorney	0.2	
2/19/2013 AN	Letter to client (Motions)	0.2	\$0.46
4/8/2013 ALF	TC w/ Client	0.1	
4/21/2013 ALF	Draft and efile proposed jury instructions	1	
4/22/2013 ALF	TC w/ Roger Birdbear	0.4	
4/22/2013 ALF	Review discovery materials; witness statements/police reports.	1	
4/22/2013 ALF	TC w/ Client	0.2	
4/23/2013 BDH	Court hearing, Final Dispo. Conference	0.5	
4/23/2013 ALF	Meet with client (8)	0.8	
4/26/2013 BDH	Met with client (9)	1	
6/14/2013 ALF	Draft proposed jury questions/response to state's proposed questionnaire.	0.5	
7/1/2013 BLD	Letter to client with copies of order approving juror questionnaire; and juror questionnaire.	0.1	\$0.46
7/9/2013 ALF	TC / Text Messages w/ client	0.3	
7/9/2013 ALF	TC w/ Roger Birdbear	0.3	
7/10/2013 BDH	Review of email from Jacon McCarthy with a cleaner copy of supplemental discovery.	0.1	
7/12/2013 LCR	Sorted through Jury Questionnaire	0.8	

	Review videotaped interview of Nathan w/ Det. Moe. Review audio recorded statements of Shelby Weist & Tori Killscro. Review text messages to / from Monica D. Review photographs of apt. Review addtl discovery docs, police reports, etc.	1.8
7/14/2013 ALF	TC with Client and with Blake	1
7/14/2013 ALF	Meeting with client. Meeting with state's attorney. Court Appearance - change of plea w/ blake. (10)	2
7/15/2013 ALF	Met with Roger Birdbear	0.3
7/15/2013 ALF	Post bond @ GFCCC	0.2
7/15/2013 ALF	Met w/ Nathan. Go to Probation/parole office w/ nathan. Met w/ Sandy Parent.	1
7/15/2013 ALF	TC with Probation officer RE: PSI interview.	0.2
7/17/2013 ALF	TC with Roger Birdbear	0.1
7/19/2013 LCR	TC to Stacey Benson (x2)	0.3
7/22/2013 LCR	Pulled reports and Emailed to Stacy Benson	0.4
7/24/2013 ALF	TC from Client	0.1
7/25/2013 JLC	Letter to Nathan re: sending out payment to Stacey Benson's office of \$2500 to cover evaluation retainer.	0.1
7/25/2013 JLC	Letter to Stacey Benson with enclosed check of \$2500 to pay for evaluation retainer.	0.1
7/29/2013 ALF	TC with client RE: Burleigh County Case	0.2
7/29/2013 ALF	TC with Burleigh County State's Atty.	0.2
8/6/2013 ALF	Emial to Marjorie K. re: revocation hearing.	0.2
8/6/2013 ALF	TC with State's Attorney	0.2
8/6/2013 ALF	Text message communications w/ client after hours.	0.2
8/7/2013 ALF	Prepare notice of filing and certificate of service and efile proof of participation in tx program.	0.5
8/8/2013 ALF	Court Appearance - Burleigh County probation revocation. Client NOT present. Bench warrant issued.	0.8
8/8/2013 BDH	Reviw email from Jodi Johnson	0.1
8/9/2013 ALF	TC with client x2	0.2
8/9/2013 ALF	Draft and efile and serve non opposition to motion to withdraw petition to revoke probation and quash bench warrant.	0.5

8/14/2013 ALF	TC with Roger Birdbear	0.1	
8/21/2013 ALF	TC with Fargo probation officer Andi D.	0.4	
8/21/2013 ALF	TC with Jodi Johnson. Dr. Benson's assistant.	0.1	
8/21/2013 ALF	TC with Roger Birdbear	0.1	
	Review of email from Jodi Johnson, re: nathan dubray being a no-show for his interview and psychological testing. They called him twice with no answer.	0.1	
8/21/2013 BDH	Phone Call	0.2	
8/22/2013 MDL	Review of email from Jodi Johnson re: rescheduling his interview. & Review of email from Stacey Benson.	0.1	
9/6/2013 BDH	Review of email from Stacey Benson re: Nathan's evaluation and needing to schedule it.	0.1	
9/9/2013 BDH	Review of email from Jodi Johnson. Re: being unable to contact Nathan.	0.1	
9/10/2013 BDH	Review PSI, prep for sentencing hearing.	0.5	
10/3/2013 ALF	Met with client, prep for sentencing hearing.	1	
10/4/2013 ALF	Sentencing Hearing	1.2	
10/4/2013 ALF	Met with Roger Birdbear	0.5	
10/4/2013 ALF	Met with client @ GFCCC	0.5	
10/4/2013 BDH	Met with client	0.7	
10/4/2013 BDH	Prep for Hearing	2	
10/4/2013 BDH	Sentencing	1.7	
10/4/2013 BDH	Met with Roger Birdbear	0.5	
10/6/2013 ALF	TC from client from GFCCC. TC with Monica Dubray.	0.2	
10/7/2013 LALF	TC with client and download/retrieve contact phone #'s	0.5	
10/8/2013 BDH	Visit client in Jail	1	
10/18/2013 LCR	Listening to CD's	0.8	
10/22/2013 LCR	Completed CD review	0.3	
12/4/2013 ALF	Review motion for restitution. Draft letter and mail to client.	0.4	
1/24/2014 ALF	Letter to client re: copies of file per client request.	1.3	\$11.30
Total:		61.8	

Phone Calls from Hankey Law to Nathan Dubray

<u>Date</u>	<u>Time</u>	<u>Duration</u>	<u>Phone No.</u>
12/11/2012	11:54 a.m.	0:30	701-421-2775
12/20/2012	2:40 p.m.	1:36	701-421-2775
01/07/2013	8:52 a.m.	0:30	701-421-2775
01/09/2013	1:45 p.m.	0:48	701-421-2775
03/27/2013	7:04 p.m.	0:42	701-421-9798
04/08/2013	3:13 p.m.	0:42	701-421-9798
04/08/2013	4:53 p.m.	4:00	701-421-5513
04/16/2013	2:16 p.m.	3:42	701-421-5513
07/09/2013	4:22 p.m.	3:12	651-212-8572
07/09/2013	4:33 p.m.	3:18	651-212-8572
07/09/2013	5:01 p.m.	0:06	651-212-8572
07/10/2013	9:33 a.m.	0:42	651-212-8572
07/12/2013	3:31 p.m.	6:00	651-212-8572

In District Court, Grand Forks County, North Dakota

Nathan G. Dubray,

Petitioner,

v.

State of North Dakota,

Respondent.

Case No. 18-2014-CV-00960

Order Denying Application for
Post-Conviction ReliefFILED IN THE OFFICE OF
CLERK OF DISTRICT COURT
GRAND FORKS COUNTY, N. DAK. ON

NOV 20 2014

REBECCA ABSEY, CLERK

BY

¶1. Petitioner, Nathan G. Dubray (Dubray), seeks Post-Conviction Relief. Dubray is represented by Attorney Monty Mertz, and the State is represented by Assistant State's Attorney David Jones.

Facts

¶2. Dubray entered open guilty pleas to two counts of Gross Sexual Imposition, a Class AA felony, on July 15, 2014. The Court determined the voluntariness of the pleas, inquired into the factual basis of the offenses, and accepted Defendant's pleas. A Presentence Investigation Report was ordered, and sentencing was scheduled for October 4, 2014. At the time set for sentencing, Dubray asked to withdraw his guilty pleas. The request was denied for the reason the Court accepted the guilty pleas on July 15, 2014. The Court reviewed the Presentence Investigation Report in open court and proceeded to impose concurrent sentences of 30 years with the North Dakota Department of Corrections, with 15 years suspended, and 10 years of supervised probation.

¶3. Dubray asserts he is entitled to post-conviction relief because of ineffective assistance of counsel. Specifically, he claims trial counsel should have hired a private investigator, deposed the State's witnesses, and filed a motion to exclude evidence of prior bad acts. An evidentiary hearing was held on October 20, 2014, and the Court heard the testimony of Nathan Dubray and defense attorney, Blake Hankey.



Law

¶4. Dubray argues Hankey provided ineffective assistance of counsel at the trial court level. In Broadwell v. State, 2014 ND 6, 841 N.W. 750, the North Dakota Supreme Court explained the petitioner's burden of proof in a claim for ineffective assistance of counsel:

"The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable by this court. To succeed on a claim for ineffective assistance of counsel, a petitioner must prove counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him. Even where the court finds that counsel's representation fell below an objective standard of reasonableness, prejudice is not normally assumed. Unless counsel's errors are so blatantly and obviously prejudicial that they would in all cases, regardless of the other evidence presented, create a reasonable probability of a different result, the prejudicial effect of counsel's errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial. Courts need not address both elements of the ineffective assistance of counsel test, and if a court can dispose of the case by addressing only one element, it is encouraged to do so."

Broadwell, 2014 ND 6, ¶ 7, 841 N.W.2d 750 (citations and internal quotation marks omitted).

The Petitioner must specify how and where trial counsel was incompetent and explain how the probable outcome would have been different Murchison v. State, 2011 ND 126, K 8,799 N.W.2d 360 (citing State v. Myers, 2009 ND 141, K 15, 770 N.W.2d 713). "A reasonable probability is a probability sufficient to undermine confidence in the outcome . . ." *Id.* at ¶ 8 (quoting Myers, at ¶ 15). In the instant case, Petitioner has failed to show how his attorney's performance was deficient and how he was prejudiced.

A. Trial counsel's tactical decision not to hire a private investigator or depose witnesses was not ineffective assistance of counsel.

¶5. At the evidentiary hearing, Attorney Blake Hankey testified that he chose not to hire a private investigator for a number of reasons. First, he stated that he worked on this case along with another attorney in his office, Adam Fleischman. Both attorneys reviewed the video-taped forensic interview. The only two people in the interview room at the time of the interview were the child and the forensic

interviewer. The child described the incident in detail. Dubray was afforded an opportunity to watch the forensic interview and discuss it with one of the attorneys. Both Hankey and Fleischman concluded the interview was handled appropriately.

¶6. In deciding not to hire a private investigator, the attorneys also considered the fact the child reported the sexual acts to her mother almost immediately after they occurred and the fact the medical reports were consistent with the reports of the social worker who investigated the case. Hankey testified in his opinion there was little benefit that could be derived by retaining a private investigator. Since only two people were present at the time of the sexual acts, the victim and Dubray, Hankey saw no reason to depose any witnesses. In Hankey's opinion, hiring a private investigator and deposing the State's witnesses would not aid with the defense and would only result in unnecessary expenses for Dubray.

¶7. Hankey did not file a pretrial motion to limit the admissibility of prior bad acts because it was his understanding the State did not intend to introduce evidence of prior bad acts in its case in chief. Hankey was also aware the State did not file a notice of intent to use prior bad acts as required by N.D.R.Evid. 404(b). Instead of spending time on what he deemed an unnecessary motion, Hankey prepared Dubray for testifying and stressed the importance of not providing responses that would open the door and allow for the admission of any prior bad acts.

¶8. The State made a plea offer, and Hankey conveyed the offer to Dubray. The offer was discussed, and Dubray chose not to accept it. Hankey then prepared for jury selection and trial as scheduled. His anticipated trial strategy in this case included a vigorous cross-examination of the social worker and an attempt to keep out any testimony of prior bad acts of Dubray. While the case was pending for trial, Dubray was free on bail. Although Hankey testified that he had difficulty contacting Dubray, he was able to meet personally with Dubray prior to trial. At this meeting they were able to

discuss the weaknesses of the State's case, the statements made by Dubray, and the statements made by the victim. Hankey advised Dubray of the lengthy sentences recently imposed by this Court following a conviction of a sexual offense. Hankey and Fleischman next met with Jason McCarthy, the attorney prosecuting the case, who informed the defense attorneys of the facts he thought he could prove at trial. Following this meeting, Hankey and Fleischman again personally met with Dubray and further discussed whether to take the case to trial. The attorneys went over the benefits of entering guilty pleas with Dubray. They informed him if he entered guilty pleas, they could attempt to reduce the risk of exposure to a harsh sentence based upon acceptance of responsibility. They also informed Dubray they could arrange for an independent psycho-sexual evaluation. After a thorough discussion of the benefits and risks of taking the case to trial, Dubray chose to enter open guilty pleas.

¶9. During the change of plea hearing, this Court thoroughly went through the voluntariness of the pleas, the facts of the crime, ensured Dubray was provided with sufficient time to discuss the case with his attorney, that Dubray was satisfied with the legal representation his attorney was providing, and that Dubray was not under the influence of any alcohol or drugs. The Court accepted the guilty pleas and scheduled sentencing for a later date to afford Dubray the opportunity to undergo an independent psycho-sexual evaluation. Despite the fact Dubray's father-in-law paid a \$2,500 retainer to an evaluator, Dubray never completed the independent psycho-sexual evaluation. Dubray also arranged for outpatient substance abuse treatment to take place between the change of plea and sentencing. Dubray, however, was terminated from the program before it was completed.

¶10. Dubray argues Hankey should have hired a private investigator, deposed the victim's mother, and filed a Motion in Limine to prevent the admission of prior bad acts. While counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary, a particular decision not to investigate must be directly assessed for reasonableness in all

the circumstances, applying a heavy measure of deference to counsel's judgments. Strickland v. Washington, 466 US at 691. It is not the function of this Court to "second guess tactical decisions of defense counsel." State v. Schlickemayer, 364 N.W.2d 108,112 (N.D. 1985) (citing State v. Motsko, 261 N.W.2d 860, 863 (N.D. 1977)). Hankey testified about the problematic issues the defense faced because of the almost immediate reporting of the incident by the child victim to her mother, Dubray's response when confronted by the victim's mother, the existence of a forensic interview, and the consistency of the statements made by the victim. This Court finds Hankey satisfactorily explained his rationale for preparing the defense in the manner he chose.

B. Dissatisfaction with the frequency of trial counsel's communication is not grounds for post-conviction relief.

¶11. In closing arguments, Dubray expressed dissatisfaction with the amount of time Hankey spent on the case. Hankey's detailed billing indicates over 60 hours of work went into the case and numerous items of written correspondence were exchanged. Dubray fails to establish how any additional attorney time would impact this case. Additionally, Hankey testified that his office had difficulty keeping in touch with Dubray. Subjective dissatisfaction with the level of communication received from an attorney is insufficient to establish a claim of ineffective assistance of counsel. State v. Fischer, 2008 ND 32, ¶ 19, 744 N.W.2d 760,766. In Fischer, the North Dakota Supreme Court denied Fischer's ineffective assistance of counsel claim based on failure to communicate because Fischer "pointed to nothing but his subjective dissatisfaction with his court-appointed attorneys. Fischer's representations and assertions on appeal [were] insufficient to establish claim of ineffective assistance." State v. Fischer, 2008 ND 32,1(19,744 N.W.2d 760,766.

C. Dubray fails to show how the results of his case would have been different had trial counsel hired a private investigator, deposed the State's witnesses, and filed a motion to limit prior bad acts.

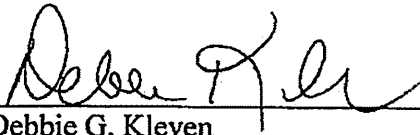
¶12. Here, Dubray's right to a jury trial was initially exercised, and a jury trial was scheduled. It was Dubray himself who opted to enter open guilty pleas and forego his right to a jury trial. The only evidence produced by Dubray at the evidentiary hearing was evidence of dissatisfaction with his trial attorney. There was no evidence presented to establish how depositions of trial witnesses, the hiring of a private investigator, or the filing of a motion to exclude prior bad acts would have changed the outcome of the trial. The Court was not made aware of Dubray's prior bad acts until sentencing, when this information became available through the Presentence Investigation Report. This same information would have been available to the Court for sentencing purposes had Dubray been convicted of the crimes by a jury. This Court concluded Dubray has failed to establish a reasonable probability of a different result.

Order

¶13. It is hereby ordered, the Application for Post-Conviction Relief is denied. Hankey's legal representation did not fall below an objective standard of reasonable performance. Additionally, there is no evidence to establish a reasonable probability that the outcome of this case would have been different had the case been tried to a jury.

Dated this 20th day of November, 2014.

By the Court:


Debbie G. Kleven
District Judge

Cc: David Jones, Assistant State's Attorney
Monty Mertz, Attorney for Petitioner

IN DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

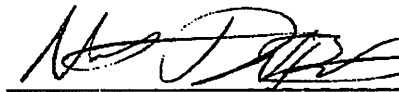
Nathan G. Dubray,)	
Petitioner,	)	NOTICE OF APPEAL
vs.)	
State of North Dakota,	)	Case No. 18-2014-CV-00960
Respondent.)	
)	

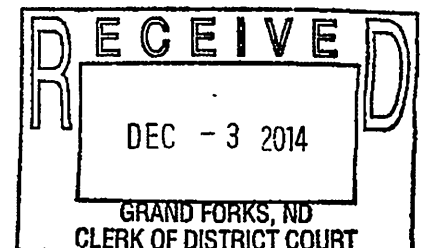
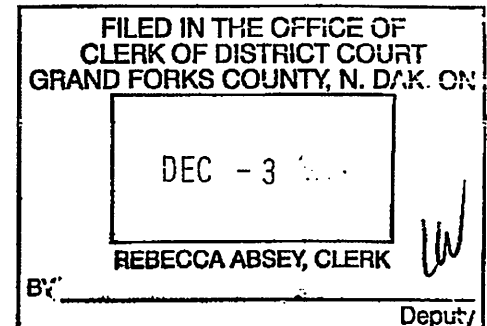
PLEASE TAKE NOTICE, that Nathan G. Dubray, the above-named Petitioner, pro se, appeals the Order Denying Application for Post-Conviction Relief, dated the 20th day on November, 2014, by the Honorable Debbie G. Kleven, District Judge, to the North Dakota Supreme Court.

STATEMENT OF PRELIMINARY ISSUES

1. Whether the district court erred when it denied Petitioner's Application For Post-Conviction Relief, as Petitioner's Counsel failed to hire a private investigator; failed to depose key state witnesses; failed to hire an expert to review the forensic interviewer's techniques; and failure to communicate all known facts so Petitioner could make an informed decision concerning going to trial or pleading out.
2. Petitioner reserves his right to add additional grounds or issues after the appointment of counsel.

Dated this 1st day of December, 2014.


Nathan Dubray, pro se
JRCC-39395
2521 Circle Drive
Jamestown, ND 58401





North Dakota Supreme Court Docket ⏪ ⏩ ⏴ ⏵

Dubray v. State

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20140428 **Nathan G. Dubray, Petitioner and Appellant**
v.
State of North Dakota, Respondent and Appellee

Appeal from: District Court, Northeast Central Judicial District, Grand Forks County
Judge Debbie Gordon Kleven

Nature of Action: Post-Conviction Relief

Counsel: Appellee: Mark Jason McCarthy, Asst. State's Attorney
Appellant: Charles Justin Sheeley
Appellee: Meredith Huseby Larson, Asst. State's Attorney

Term: 09/2015 **Argument:** 09/21/2015 1:30pm

ND cite: 2015 ND 244

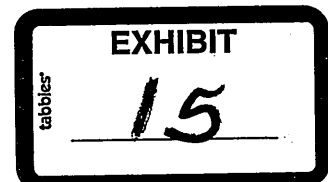
NW cite: 872 N.W.2d 633

Issues: **Appellant's Statement of the Issues:**
Whether the District Court Order denying Dubray's application for Post Conviction Relief should be reversed?

Appellee's Statement of the Issues:
I. Whether the district court properly denied Dubray's motion for post conviction relief?

Docket entries:

- 1 12/03/2014 NOTICE OF APPEAL: 12/03/2014
- 2 12/04/2014 NOT. OF FILING NOT. OF APPEAL AND PROOF OF SERV.
- 3 12/04/2014 Notice served on Nathan Dubray, M. Jason McCarthy and Monte Mertz
- 4 12/03/2014 ORDER FOR TRANSCRIPT: 12/03/2014
- 5 01/02/2015 ELEC. RECORD ON APPEAL DATED JANUARY 2, 2015 (ENTRY NOS.1-41)
- 6 01/09/2015 AMENDED ELEC. RECORD ON APPEAL DATED JANUARY 9, 2015 (ENTRY NOS.1-17, 19-26, 28-37, 39-43)
- 7 01/12/2015 MOT. EXT/TIME APPELLANT BRIEF



8 01/14/2015 NO ACTION TAKEN (motion is premature)
9 02/02/2015 ELECTRONIC TRANSCRIPT DATED OCTOBER 20,
2014 w/ REDACTION KEY & C.O.S.
10 02/02/2015 Rcv'd c.o.s. of tra on appellant
11 02/23/2015 Assignment of Monty Mertz as counsel for Appellant
12 03/09/2015 ELEC. RECORD ON APPEAL DATED MARCH 9,
2015 (ENTRY NOS.1-39, 41-89)(underlying)
13 03/10/2015 AMENDED ELEC. RECORD ON APPEAL DATED
MARCH 10, 2015 (ENTRY NOS.1-39, 41-76, 78-95)
14 03/10/2015 (NOT SENT: 77)(underlying)
15 03/11/2015 MOT. EXT/TIME APPELLANT BRIEF
16 03/11/2015 E-FILED MOTION
17 03/11/2015 E-mail that State does not object to request
18 03/11/2015 ACTION BY CLERK. Granted: 03/30/2015
19 03/30/2015 APPELLANT BRIEF (PDF)
20 03/30/2015 E-FILED BRIEF (PDF)
21 03/30/2015 APPELLANT APPENDIX
22 03/30/2015 E-FILED APPENDIX
23 04/01/2015 Rcv'd 7 copies of ATB & 6 copies of ATA from CSD
24 04/13/2015 E-filing surcharge for ATB paid 4-13-15 through inter-
departmental billing
25 04/24/2015 MOTION FOR Extension of Time to File
Supplemental Statement under N.D.R.App.P. 24
26 04/24/2015 ACTION BY CHIEF JUSTICE. Granted: 05/29/2015
27 04/24/2015 MOT. EXT/TIME APPELLEE BRIEF (by the Court)
28 04/24/2015 ACTION BY CHIEF JUSTICE (30 days after service
of Rule 24 statement. Granted: 06/30/2015
29 05/28/2015 Supplemental Statement of Indigent Appellant
purusant to Rule 24 N.D.R.App.P (scanned)(PDF)
30 05/28/2015 DISK NONCOMPLIANCE
31 06/10/2015 Charles Sheeley is substituted at counsel for the
Appellant.
32 06/24/2015 APPELLEE BRIEF (PDF)
33 06/24/2015 E-FILED BRIEF
34 06/25/2015 Rcv'd c.o.s. of AEB on C. Sheeley
35 06/29/2015 Rcv'd \$25 e-filing surcharge for AEB (receipt #23699)
36 06/30/2015 Rcv'd 7 copies of AEB from CSD
37 07/08/2015 REPLY BRIEF (PDF)
38 07/08/2015 E-FILED BRIEF (PDF)
39 07/14/2015 Received 7 copies of the RYB from Central
Duplicating
40 07/31/2015 NOTICE OF ORAL ARGUMENT SENT
41 09/21/2015 APPEARANCES: Charles J. Sheeley; M. Jason
McCarthy
42 09/21/2015 ARGUED: Charles J. Sheeley; M. Jason McCarthy
43 09/21/2015 ORAL ARGUMENT WEBCAST

44 10/13/2015 DISPOSITION: AFFIRMED BY SUMMARY DISP.
45 10/13/2015 UNANIMOUS OPINION: Per Curiam,
46 10/14/2015 Judgment Sent to Parties
47 11/12/2015 MANDATE

→

20140428

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 30, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

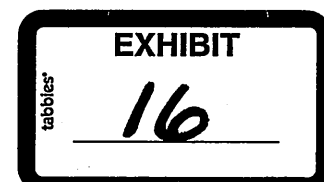
Nathan Dubray,)	
	)	Supreme Court no. 20140428
Petitioner/Appellant,)	
)	
-vs-	)	District Court no. 2014-CV-00960
)	
State of North Dakota,)	
)	
Respondent/Appellee,)	
)	

Brief of Petitioner/Appellant Nathan Dubray

Appeal from Order Entered on November 20, 2014

In District Court, County of Grand Forks, State of North Dakota
The Honorable Debbie G. Kleven

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Attorney for Nathan Dubray



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<i>Premo v. Moore</i> , 131 S. Ct. 733 (2011).....	¶ 50
<i>Sambursky v. State</i> , 2006 ND 223, 723 N.W.2d 524.....	¶ 50
<i>State v. Moore</i> , 2005 ND 183, 709 N.W.2d 21.....	¶ 57
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<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	¶ 50
<i>Tollett v. Henderson</i> , 411 U.S. 258 (1973).....	¶ 50
<i>Woehlhoff v. State</i> , 487 N.W.2d 16 (N.D. 1992).....	¶ 50

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¶ 3 Issue

¶ 4 Whether the District Court Order denying Dubray's application for Post Conviction Relief should be reversed?

¶ 5 Statement of the Case

¶ 6 Nathan Gene Dubray (hereinafter Dubray) was charged with two counts of Class AA Felony Gross Sexual Imposition by an Information filed August 6, 2012, in Grand Forks County Case No. 2012-CR-01960. (CR Doc ID# 2)(Criminal file Register of Actions = CR)(App. 3-4). Dubray pleaded guilty on July 15, 2013 to both counts. A pre-sentence investigation was ordered. (CR Doc # 70).

¶ 7 Dubray was sentenced on October 4, 2013 to concurrent sentences of thirty years, with fifteen years suspended for ten years of supervised probation. (CR Doc ID# 78). A motion for restitution was granted, and Count 1 of the Judgment was amended to order restitution in the amount of \$5,265.53. (CR Doc ID# 88)(App. 5-12).

¶ 8 Dubray then applied for post-conviction relief in a Petition filed on July 14, 2014, supported by a brief, in Grand Forks County file No. 2014-CV-00960 (CV Doc ID # 1; App. 13-16 & 17-39)(Entries in the Clerk's Register of Action in the civil file will be CV Doc ID# and pages in the Appendix App.). The State's Answer was filed on July 24, 2014. (CV Doc ID# 10; App. 40-42).

¶ 9 An evidentiary hearing was held on October 20, 2014. (Transcript of evidentiary hearing, hereinafter TR3). All relief was denied by the Order Denying Application for Post-Conviction Relief, filed on November 20, 2014. CV Doc ID#

35, App. 43-48). Notice of Appeal was filed on December 3, 2014. (CV Doc ID# 36; App. 49).

¶ 10 Statement of Facts

¶ 11 Dubray entered guilty pleas on the eve of his jury trial. (TR1: 1-19)(Plea Hearing Transcript = TR1; Sentencing Transcript = TR2; Pst-Conviction Hearing Transcript = TR3). Dubray's retained attorney, Blake Hankey, informed the court that Dubray would enter "open pleas" based upon a recommendation the state would make at sentencing. The pleas would be "Alford pleas." (TR1 3: LL 14-22). The court conducted an appropriate colloquy with Dubray, including ensuring his understanding of an Alford plea. (TR1 9: LL 14-22).

¶ 12 The court asked the prosecutor to recite the factual basis for the guilty plea. (TR1 9: L 23)

¶ 13 On January 3, 2012, a juvenile female M.W. born in 2003, reported that Dubray, then twenty-six years old, woke her up and brought her into the living room of her mother's residence, where he "rubbed her private" during the early morning hours of January 3, 2012. (TR1 9: LL 14-15 to 10: LL 1-6). She also reported that Dubray unzipped his pants and tried to make her "lick his bottom" (TR1 10: LL 7-8). In an interview using pictures she identified a male's bottom as his penis and her private as her vagina. (TR1 10: LL 7-13).

¶ 14 The first encounter was interrupted by a knock at the door. This caused Dubray to put his penis back in his pants and the girl went to bed. (TR1 10: LL

17-19). Law enforcement officers were sent to the residence at 3:00 a.m. that morning to conduct a welfare check on Dubray. (TR1 10: LL 20-23).

¶ 15 The girl reported she was awakened again by Dubray, this time after the sun was up that same morning. (TR1 10: LL 24-25; 11: L1).

¶ 16 The girl stated Dubray brought her into the living room and had her sit on his lap. He took his bottom (penis) from his pants and made her touch his penis with her hand. In an interview she said he wanted her to do something with her hand, which she described as a back and forth motion. At the same time, Dubray had his hand down her pants rubbing her vaginal area. (TR1 11: LL 1-11).

¶ 17 Dubray was interviewed by a detective later the same day, January 3, 2012. (TR1 11: LL 12-13). Dubray indicated late that morning he had been awakened by the girl's mother who was yelling at him about touching the girl. (TR1 11: LL 12-18). When asked about touching the girl's privates, Dubray said, "I would never do that." When asked why the girl would say or make that up, his response was: "Usually a child that age, they are telling the truth." (TR1 11: LL 16-21).

¶ 18 When the detective told Dubray the girl had stated he asked her to touch his privates, Dubray put his hands over his eyes and began to weep, stating, "If I did, I'm sorry" and "I honestly don't know." (TR1 11: LL 22-25; 12: LL 1). Dubray also stated that he "blacked out" and doesn't remember exactly what he did, but remembered going to Joe Bull's residence between 3:00 and 8:00 a.m. Dubray also stated, "I don't know if I did or if I didn't. If I did, I don't know," when the accusations were repeated. (TR1 12: LL 2-8). Dubray also told investigators he

had been drinking Vodka, smoking marijuana, and drank at least one beer. (TR1 12: LL 9-12).

¶ 19 Dubray agreed with those facts. (TR1 12: LL 13-15). The court asked Mr. Hankey to further comment on the basis for the Alford plea, and he reiterated Dubray's consumption of alcohol and marijuana and Dubray's assertion that he could not remember what happened. (TR1 12: LL 16-25; 13: LL 1-17). The court asked Dubray if he was under the influence to the point he could not recall what happened on the dates in question. Dubray agreed. (TR1 13: LL 18-25; 14: LL 1-4).

¶ 20 The Court found a factual basis for Dubray's guilty pleas and that they were freely and voluntarily made. (TR1 14: LL 5-7).

¶ 21 The sentencing hearing took place on October 4, 2013. (TR2 1-39). Mr. Hankey informed the court Debray wanted to withdraw his guilty pleas pursuant to **N.D.R.Crim.P 11(d)(B)(ii)** which allows withdrawal of guilty pleas for any fair and just reason prior to sentencing. (TR2 3: LL 14-24). The trial court decided to proceed with the sentencing hearing, referring to **State v. Moore**. The court indicated that Dubray could file a motion supported by a brief and affidavits and allow the state to respond. If Dubray could show a fair and just reason, he would be allowed to withdraw his pleas, but the court would proceed with his sentencing. (TR2 4: LL 11-25; 5: LL 1-4).

¶ 22 Mr. Hankey also indicated Dubray felt pressured by defense counsel to plead guilty, and asked the court to address that issue. (TR2 5: LL 5-17). The

court addressed Dubray and stated that Dubray had stated his pleas were freely and voluntarily made and that no one had made any threats or promises to him. Dubray agreed. (TR2 5: LL 21-25; 6: LL 1-8). The court denied the request and again indicated Dubray could file a motion and indicated the court would proceed. (TR2 6: LL 9-17).

¶ 23 As part of its sentencing argument, the prosecutor indicated that this was “at least the third time the defendant has been alleged to have committed a similar type of event.” (TR2 11: LL 5-7). The prosecutor went on to indicate that although the defendant may not have been convicted, he had received some form of sexual addiction therapy related to a previous allegation, so he would expect that his behavior would cause harm to a child. (TR2 11: LL 5-19). The prosecutor also went on to argue that because of his prior behavior and his Alford plea he was not fully admitting what he did to the child, it would be “impossible to state that the defendant won’t do it again.” (TR2 12: LL 10-25).

¶ 24 The prosecutor went on to argue that the defendant had abused a “public position of responsibility or trust,” due to his relationship with the child’s family. (TR2 14: LL 5-16). The prosecutor also alluded to what amounts to Dubray’s “selective memory” of the events. (TR2 13: LL 2-16).

¶ 25 Hankey pointed out that Dubray has had a difficult life and has turned to addiction. He graduated from high school and completed some college courses. His criminal history was minor prior to these offenses. Dubray’s wife has reported that when he is sober he is a good and loving father. (TR2 16: LL 5-25; 17: LL 1-

25). Mr. Hankey also pointed out he was not convicted of prior allegations for similar conduct. Mr. Hankey argued that the moderate risk assessment was due to the prior unproven allegations and his supposed failure to take responsibility for his actions in this case. Aside from those considerations, his risk to reoffend would be low. (TR2 18: LL 6-23).

¶ 26 Hankey argued for a sentence of thirty years with twenty-five suspended for ten years of supervised probation. (TR2 20: LL 1-24). The Court followed the State's recommended sentence of thirty years, with fifteen suspended and ten years of supervised probation. (TR2 26: LL 3-8).

¶ 27 The Court advised Dubray of his right to appeal and reminded him he could file a motion to withdraw his guilty pleas. (TR2 37: LL 12-21). No appeal was filed and no motion to withdraw the guilty pleas was filed.

¶ 28 An evidentiary hearing was held on October 20, 2014 on Dubray's application for post-conviction relief. (TR3, 1-60). Two witnesses testified, Dubray and his attorney, Blake Hankey. (TR3, 4-25; 25-50).

¶ 29 Dubray claims he received ineffective assistance of counsel. (TR3 4: LL 10-13). Dubray was represented by Blake Hankey. Hankey did not hire a private investigator. He did not take any depositions. He did not interview any of the state's witnesses. He did not explore any defense witnesses. (TR3 4: LL 17-25; 5: L 1-7).

¶ 30 Dubray entered an Alford plea on the eve of his jury trial. (TR3 5: LL 8-11). Dubray met with Hankey to prepare for trial but did not know what the theory of his defense would be. (TR3 6: L 25; 7: LL 1-2).

¶ 31 There were two incidents in Dubray's past which were disclosed in discovery and the pre-sentence report. On both occasions, Dubray had been accused of sexual misconduct. (TR3 9: LL 1-3). On the first occasion, Dubray was accused of touching a younger cousin. He attended classes for sexual offenders. (TR3 9: LL 5-22). He was told if he didn't admit to it, he would have to sit in the Boy's Ranch until he was 21. So, he admitted it, but did not do it. He was not represented by an attorney. (TR3 10: LL 1-17).

¶ 32 In the second incident, Dubray was accused of raping a fourteen year old girl. (TR3 10: LL 18-25). He was in California when the girl was allegedly raped. Dubray did not do either act. (TR3 11: LL 1-18). However, these alleged incidents entered into the plea discussions with his attorney. (TR3 11: LL 19-22).

¶ 33 The prior incidents of alleged sexual misconduct entered into discussions about whether he should plead guilty and whether those incidents would come up during the trial. (TR3 12: LL 1-13). Dubray felt he had no choice but to take the plea agreement. (TR3 12: L 25; 13: LL 1-3).

¶ 34 On the day of sentencing, Dubray asked the court if he could withdraw his guilty pleas. (TR3 13: LL 3-10). He felt Hankey had not provided an adequate defense. Hankey did not hire an expert witness to address the issues with the child victim. (TR3 13: LL 15-25; 14: LL 1-5).

¶ 35 Dubray asked the court to let him have a trial because he believes he is innocent. (TR3 14: LL 16-21). Dubray felt his attorney could have shown the state's witnesses were not telling the truth. (TR3 15: LL 1-7). Dubray conceded he told the court when he pleaded guilty that he had sufficient time to discuss his case with attorneys and he was satisfied with them. It was also his decision to plead guilty. (TR3 15: LL 12-25). Dubray said he was frustrated with his sentence. (TR3 16: LL 5-7).

¶ 36 Dubray conceded he had made statements to law enforcement to the effect, "If I did it, I'm sorry. I don't know," and "I don't know if I did it or not. I blacked out." (TR3 16: LL 15-25). Dubray also conceded that at his change of plea hearing, he admitted he was too drunk to remember. (TR3 17: LL 1-4).

¶ 37 Dubray said he owed it to his children to withdraw his guilty pleas and prove he is innocent. However, he conceded he had said: "[A] child at that age is probably not going to lie." (TR3 17: LL 15-25; 18: L 1).

¶ 38 Dubray conceded he was confronted by the child's mother within a short time after the alleged incident. (TR3 19: LL 19-25; 20: LL 1-25; 21: LL 1-11).

¶ 39 Attorney Blake Hankey testified and exhibits were introduced to reflect his time records and correspondence with Dubray. (TR3 25: LL 17-25; 26: LL 1-25; 27: LL 1-25, 28: LL 1-12).

¶ 40 Hankey indicated he watched the forensic video of the child's interview and saw no need to hire an expert. (TR3 29: LL 20-25; 30: LL 1-23).

¶ 41 Hankey indicated that with “this judge” there were “hefty sentences” after a loss at trial. (TR3 35: LL 8-16).

¶ 42 Mr. Hankey conceded he did not file a motion in limine as to the alleged prior sexual misconduct by Dubray. (TR3 38: L 25; 39: LL 1-12). There was no pretrial hearing on the issue of hearsay evidence. (TR3 40: LL 14-25; 41: LL 1-3).

¶ 43 Hankey did not hire a private investigator. He did not take any depositions. (TR3 41: LL 19-24). Neither Hankey nor any of his staff interviewed any witnesses in the case. (TR3 41: L 25; 42: LL 1-2). Hankey did not see it was necessary to hire a private investigator or depose any witnesses. (TR3 42: LL 1-18).

¶ 44 Hankey has never deposed a victim in a sexual assault or GSI case. (TR3 42: LL 19-25).

¶ 45 Although Hankey claimed his client was prepared to go to trial and pleaded guilty on the eve of trial, he could not articulate his theory of defense had there been a trial. (TR3 43: LL 1-7). Hankey felt it is not difficult to cross-examine a child victim in a sexual assault case. (TR3 44: LL 13-24).

¶ 46 Hankey indicated he wanted to confront witnesses for the first time in front of the jury even when he had no idea what their answers would be. (TR3 45: LL 8-24).

¶ 47 Argument

¶ 48 The Order denying Dubray post conviction relief should be reversed.

¶ 49 Standard of Review

¶ 50 Dubray asserts he received ineffective assistance of counsel, he was ill advised to plead guilty, and asks that he be allowed to withdraw his guilty pleas and go to trial.

Generally, when a post-conviction relief applicant seeks to withdraw a guilty plea, the district court looks to whether relief is necessary to correct a "manifest injustice." *See Moore v. State*, 2013 ND 214, ¶ 10, 839 N.W.2d 834. "When a defendant applies for post-conviction relief seeking to withdraw a guilty plea, we . . . treat the application as one made under N.D.R.Crim.P. [11](d)." *Moore*, at ¶ 10 (*quoting Greywind v. State*, 2004 ND 213, ¶ 7, 689 N.W.2d 390). "Withdrawal is allowed when necessary to correct a manifest injustice." *Moore*, at ¶ 10. "Before accepting a plea of guilty, the court must . . . determine that the plea is voluntary and did not result from force, threats, or promises other than promises in a plea agreement." N.D.R.Crim.P. 11(b)(2). "Waivers of constitutional rights, such as guilty pleas, must be done freely and voluntarily." *Moore*, at ¶ 11.

When a defendant pleads guilty on the advice of counsel, the defendant "may only attack the voluntary and intelligent character of the guilty plea." *Damron v. State*, 2003 ND 102, ¶ 9, 663 N.W.2d 650 (*quoting Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). Unless a defendant can prove "serious derelictions" on the part of the defendant's attorney that kept a plea from being knowingly and intelligently made, the defendant will be bound by that guilty plea. *Damron*, at ¶ 13 (*citing McMann v. Richardson*, 397 U.S. 759, 774 (1970)). "In criminal cases, the defendant has the burden to present evidence to overcome the presumption that defense counsel is competent and adequate, and to do so, the defendant must point 'to specific errors made by trial counsel.'" *Damron*, at ¶ 13 (*quoting State v. Slapnicka*, 376 N.W.2d 33, 36 (N.D. 1985)). In this case, Lindsey's post-conviction relief application and supplemental brief seek to have her guilty plea set aside on grounds of ineffective assistance of counsel, newly discovered evidence, and prosecutorial misconduct.

Lindsey claims she received ineffective assistance of counsel leading to her guilty plea.

An applicant for post-conviction relief bears a "heavy burden" to prevail on an ineffective assistance of counsel claim. *See Bahtiraj*

v. State, 2013 ND 240, ¶ 8, 840 N.W.2d 605; *Patten v. State*, 2008 ND 29, ¶ 9, 745 N.W.2d 626.

[T]o prevail on a post-conviction relief application based on ineffective assistance of counsel, the petitioner must (1) "show that counsel's representation fell below an objective standard of reasonableness" and (2) "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington***, 466 U.S. 668, 688, 694 (1984).

Surmounting ***Strickland's*** high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial or in pretrial proceedings, and so the ***Strickland*** standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under ***de novo*** review, the standard for judging counsel's representation is a most deferential one. . . . It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence.

Premo v. Moore, 131 S. Ct. 733, 739-40 (2011) (internal quotations and citations omitted). The two-part Strickland test "applies to challenges to guilty pleas based on ineffective assistance of counsel." ***Hill v. Lockhart***, 474 U.S. 52, 58 (1985). "Thus, a defendant must demonstrate both deficient representation by counsel and prejudice caused by the deficient representation." ***Woehlfhoff v. State***, 487 N.W.2d 16, 17 (N.D. 1992). . . .

The first prong is measured using "prevailing professional norms," ***Sambursky v. State***, 2006 ND 223, ¶ 13, 723 N.W.2d 524, and is satisfied if [the defendant] proves counsel's conduct consisted of errors serious enough to result in denial of the

counsel guaranteed by the Sixth Amendment. See **Strickland**, 466 U.S. at 687.

Bahtiraj, 2013 ND 240, ¶¶ 9-10, 840 N.W.2d 605. The second prong of the **Strickland** test is satisfied in the context of a guilty plea if the defendant shows "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." **Ernst v. State**, 2004 ND 152, ¶ 10, 683 N.W.2d 891 (*quoting Hill*, 474 U.S. at 59); see also **Bahtiraj**, at ¶¶ 15-16.

Lindsey v. State, 2014 ND 174, ¶¶ 16- 19, 852 N.W.2d 383.

¶ 51 Dubray asserts his pleas were not voluntary due to his attorney's serious derelictions. Hankey indicated he watched the forensic video of the child's interview and saw no need to hire an expert. (TR3 29: LL 20-25; 30: LL 1-23). Hankey indicated that with "this judge" there were "hefty sentences" after a loss at trial. (TR3 35: LL 8-16). Mr. Hankey conceded he did not file a motion in limine as to the alleged prior sexual misconduct by Dubray. (TR3 38: L 25; 39: LL 1-12). There was no pretrial hearing on the issue of hearsay evidence. (TR3 40: LL 14-25; 41: LL 1-3). Hankey did not hire a private investigator. He did not take any depositions. (TR3 41: LL 19-24). Neither Hankey nor any of his staff interviewed any witnesses in the case. (TR3 41: L 25; 42: LL 1-2). Hankey did not see it was necessary to hire a private investigator or depose any witnesses. (TR3 42: LL 1-18). Hankey has never deposed a victim in a sexual assault or GSI case. (TR3 42: LL 19-25). Although Hankey claimed his client was prepared to go to trial and pleaded guilty on the eve of trial, he could not articulate his theory of defense had there been a trial. (TR3 43: LL 1-7). Hankey felt it is not difficult to cross-examine a child victim in a sexual assault case. (TR3 44: LL 13-24). Hankey indicated he

wanted to confront witnesses for the first time in front of the jury even when he had no idea what their answers would be. (TR3 45: LL 8-24).

¶ 52 The prior incidents of alleged sexual misconduct entered into discussions about whether Dubray should plead guilty and whether those incidents would come up during the trial. (TR3 12: LL 1-13). Dubray felt he had no choice but to take the plea agreement. (TR3 12: L 25; 13: LL 1-3). On the day of sentencing, Dubray asked the court if he could withdraw his guilty pleas. (TR3 13: LL 3-10). He felt Hankey had not provided an adequate defense. Hankey did not hire an expert witness to address the issues with the child victim. (TR3 13: LL 15-25; 14: LL 1-5). Dubray asked the court to let him have a trial because he believes he is innocent. (TR3 14: LL 16-21). Dubray felt his attorney could have shown the state's witnesses were not telling the truth. (TR3 15: LL 1-7). Dubray conceded he told the court when he pleaded guilty he had sufficient time to discuss his case with attorneys and he was satisfied with them. It was also his decision to plead guilty. (TR3 15: LL 12-25). Dubray said he was frustrated with his sentence. (TR3 16: LL 5-7). Dubray conceded he had made statements to law enforcement to the effect, "If I did it, I'm sorry. I don't know," and "I don't know if I did it or not. I blacked out." (TR3 16: LL 15-25). Dubray also conceded that at his change of plea hearing, he admitted he was too drunk to remember. (TR3 17: LL 1-4). Dubray said he owed it to his children to withdraw his guilty pleas and prove he is innocent. However, he conceded he had said: "[A] child at that age is probably not going to lie." (TR3 17: LL 15-25; 18: L 1). Dubray conceded he was

confronted by the child's mother within a short time after the alleged incident. (TR3 19: LL 19-25; 20: LL 1-25; 21: LL 1-11).

¶ 53 Hankey defended Dubray against two counts of Gross Sexual Imposition, both AA felonies, punishable by life without the possibility of parole. **N.D.C.C. §§12.1-20-03(1)(d), 12.1-20-03(3)(a), 12.1-32-01(1)**. The stakes aren't any higher in North Dakota. Notwithstanding, Hankey did not see a need to hire an expert witness to review information about the child victim of sexual abuse, after watching the video of the forensic interview with the child. (TR3 29: LL 20-25; 30: LL 1-23). At the same time, the court had not conducted a pre-trial hearing to determine whether any of the hearsay evidence would be admitted at trial. Such a hearing is mandatory. **N.D.R.Evid. 803(24)**.

¶ 54 All Hankey did do was study and share the materials disclosed in discovery by the prosecutor. He did not interview, nor did he depose any witnesses, either for the state or the defense. He did not interview the child or the child's mother. Hankey stated he has never deposed defense witnesses in a sexual assault case. He wants to find out what they have to say for the first time at trial in front of the jury. (TR3 44: LL 13-24, 45: LL 8-24). Hankey conceded he did not file a motion in limine as to the alleged prior sexual misconduct by Dubray. He felt he could keep that information out of evidence unless they opened the door. (TR3 38: L 25; 39: LL 1-12). However, those prior allegations loomed as a dark cloud over Dubray when he entered Alford pleas on the eve of his jury trial. Hankey struggled to articulate what the theory of defense would be at trial.

¶ 55 All Hankey did was review the basic discovery and share it with Dubray. He literally did nothing more, and was ostensibly ready to go to trial on two AA felonies. Yes, Dubray conceded he had made some arguably incriminating statements, but those statements were far from a confession. He also admitted that he told the court when he pleaded guilty he could not remember committing the crimes because he was drunk. Dubray asked the court to withdraw his guilty pleas before he was sentenced, and claimed he felt forced by his attorney to plead guilty. (TR3 13: LL 3-10).

¶ 56 Hankey did make an oral motion to withdraw the guilty pleas. The sentencing hearing took place on October 4, 2013. (TR2 1-39). Hankey informed the court Debray wanted to withdraw his guilty pleas pursuant to **N.D.R.Crim.P 11(d)(B)(ii)** which allows withdrawal of guilty pleas for any fair and just reason prior to sentencing. (TR2 3: LL 14-24).

¶ 57 The trial court decided to proceed with the sentencing hearing, referring to **State v. Moore**, presumably **State v. Moore, 2005 ND 183, 709 N.W.2d 21**, although nothing in that per curiam opinion lends support to the procedure the court followed. The court indicated that Dubray could file a motion supported by a brief and affidavits and allow the state to respond. If Dubray could show a fair and just reason, he would be allowed to withdraw his pleas, but the court would proceed with his sentencing. (TR2 4: LL 11-25; 5: LL 1-4).

¶ 58 In its decision, the trial court did not address the proper standard articulated by this court in **Lindsey v. State, 2014 ND 174, ¶¶ 16- 19, 852 N.W.2d 383**. (App. 43-48). “The second prong of the **Strickland** test is satisfied in the context

of a guilty plea if the defendant shows "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Ernst v. State*, 2004 ND 152, ¶ 10, 683 N.W.2d 891. (*citations omitted*). The question is not whether Duray would have been acquitted at trial, which is the standard applied by the trial court. The standard is whether, if Hankey's performance had not been so deficient, there is a reasonable probability that Dubray would not have pleaded guilty. Dubray has proven on this record that Hankey's performance prior to his guilty pleas did fall below an objective standard of reasonableness, and the trial court's findings to the contrary are erroneous. Hankey did no independent investigation or preparation and planned to try the case by the seat of his pants. Dubray was placed in such a position by his attorney that he felt he had no choice but to plead guilty, not based upon confidence in his attorney's advice after leaving no stone unturned, but based upon being helpless to make a knowing, intelligent and voluntary waiver of his right to a trial.

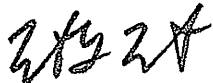
¶ 59 This court should apply the lesser "fair and just" standard, not the far more onerous "manifest injustice" standard, because Hankey neither filed a motion to withdraw the guilty pleas, despite being invited to do so, nor did he file a direct appeal. Furthermore, the trial court abused its discretion by not allowing Dubray to withdraw his guilty plea applying the "fair and just" standard. There is no indication in this record that the prosecution would have been prejudiced in any manner had Dubray been allowed to withdraw his guilty pleas. **N.D.R.Crim.P. 11(d)(1) & (3).**

¶ 60 In summary, Dubray was provided ineffective assistance of counsel as to his guilty pleas in this case. Dubray was facing two AA felonies and was entitled to more than his attorney's cursory review of the state's discovery. An issue of great concern is how the prior allegations of sexual misconduct against Dubray improperly played a role in his guilty pleas. The trial court applied the wrong standard to Dubray's application for post-conviction relief. Dubray does not have to prove he would have been acquitted at trial, but that he would not have pleaded guilty if his attorney's representation had been effective, which he has done.

¶ 61 Conclusion

¶ 62 The District Court's Order should be reversed, the Criminal Judgment should be vacated, and Dubray should be allowed to withdraw his guilty pleas.

Respectfully submitted this 30th day of March, 2015.



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IN RE

Dubray v. State
Supreme Court No. 20140428
Grand Forks Co. No. 2014-CV-00960

**CERTIFICATE OF SERVICE
BY ELECTRONIC MEANS**

I, Monty G. Mertz, do hereby certify that, on the 30th day of March, 2015, I served the Brief of Petitioner/Appellant Nathan Dubray and the Appendix in this case on the following:

Mark Jason McCarthy ND Bar ID# 05656

Attorney at Law

Grand Forks County

State's Attorney's Office

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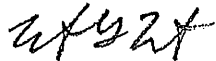
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Grand Forks, ND 58206-5607

Attorney for Appellee

by sending an E mail to sasupportstaff@gfcounty.org with the documents attached in PDF format. To the best of my knowledge, this is the Eservice address for Mr. McCarthy.

Dated this 30th of March, 2015.



Monty G. Mertz, ND Bar ID#03778

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IN RE

Dubray v. State
Supreme Court No. 20140428
Grand Forks Co. No. 2014-CV-00960

**CERTIFICATE OF SERVICE
N.D.R.App.P. 24**

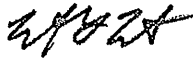
I, Monty G. Mertz, do hereby certify that, on the 30th day of March, 2015, true copies of the **Brief of Petitioner/Appellant Nathan Dubray** and the **Appendix** in this case were mailed to:

Mr. Nathan Dubray
#39395
James River Corrections Center
2521 Circle Drive
Jamestown, ND 58401

Petitioner/Appellant

To the best of my knowledge, this is the mailing address for Mr. Dubray.

Dated this 30th day of March, 2015.



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20140428

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

MAY 28 2015

STATE OF NORTH DAKOTA

NATHAN Dubray,

Petitioner/Appellant,

vs.

STATE OF NORTH DAKOTA,

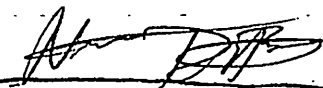
Respondent/Appellant,

Supreme Court No. 20140428

District Court No. 2014-CV-00960

Rule 24, SUPPLEMENTAL STATEMENT
OF PETITIONER/APPELLANT NATHAN DUBRAY

APPEAL FROM ORDER ENTERED ON NOVEMBER
20, 2014, IN DISTRICT COURT, COUNTY OF GRAND
FORKS, STATE OF NORTH DAKOTA, THE HONORABLE
DEBBIE G. KIEVEN.



NATHAN DUBRAY

James River Correctional Center

2521 Circle Drive

James town, North Dakota 58401

EXHIBIT

17

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[#3] SUPPLEMENTAL STATEMENT OF ADDITIONAL GROUNDS

[#4.] Petitioner/Appellant ("Appellant") received ineffective assistance of counsel during the original proceeding, outside the range of competence demand of attorneys in a criminal case, in violation of Appellant's Sixth Amendment rights under the United States Constitution.

[#5.] Appellant's Father-in-Law paid the original Trial Attorney ("counsel") \$50,000.00 (Fifty-Thousand Dollars) to represent Appellant in the underlying criminal offense(s) in this matter.

[#6.] Counsel made many promises to Appellant concerning the representation, including (1) To conduct a complete investigation with a private investigator. (2) To hire an expert to investigate or conduct relevant research into the fact that the alleged child victim's memory may have been tainted by relatives, adult authority figures or by the forensic interviewer; (3) To supply Appellant with all information, facts, documents, papers, reports and transcripts in a timely manner; (4) To communicate with Appellant in order to keep Appellant informed

⑤ To represent Appellant with his great Skill, Knowledge of the law and it's effects on Appellant's diligence and preparation.

[4+7.] Counsel failed to conduct the promised "Complete investigation" with a private investigator, even though a large portion of the original \$50,000.00 U.S. Dollars was to be used to hire a private investigator for this investigation. Some of the facts a private investigator would have discovered are:

a.) That evidence given by the alleged Child victim, during the forensic interview on January 9, 2012, which was conducted by Tammy Knudson, of the Grand Forks County Social Services, was tainted by concerned authority figures, including but not limited to: anxious parents and other adult family members, school teachers, police officials, and social worker therapists.

b.) That this forensic interview was conducted seven (7) days after the

alleged incident, and that during these (7) seven days prior to the forensic interview the alleged child victim had been repeatedly questioned by several authority figures in different settings, and this repeated questioning, interviewing and counseling tainted the alleged child victim such that the alleged child victim would not be competent to testify under the rules of evidence. The private investigator would have discovered evidence of tainted memory, which would have raised reasonable concern as to whether the alleged child victim would be able to testify by memory, had counsel hired a private investigator.

C.) That the Prosecuting Attorney knew or had a duty to know that charging Appellant with multiple offenses was multiplicity, highly suspicious and based on fabricated and/or Tainted evidence, and was designed to scare Appellant into pleading Out, when Appellant clearly wanted

To go to trial.

d.) That statements and/or evidence given to Law Enforcement by Bobby Joe Bull; Torey Lynn Killscrow; Shelby Joleen Weist; Thomas Weist and Mario Alcon did not conform with the facts and were deceptive and untruthful. And had a criminal and personal background check been conducted on these persons it would have also been discovered that some if not all had untruthful characters and/or prior crimes of dishonesty or false statements to law enforcement.

[4.8] Counsel failed to hire the promised expert to investigate or conduct relevant research into the fact that the alleged Child Victim's memory may have been tainted by relatives, adult authority figures or by the forensic investigator, even though a large portion of the original \$50,000.00 U.S. Dollars was to be used to hire an expert for this investigation. Some of the facts

an expert would have discovered are;

a.) That the evidence given by the alleged child victim, during the forensic interview on January 9, 2012, which was conducted by Tammy Knudson, of Grand Forks County Social Services was tainted by concerned authority figures, including but not limited to: Anxious parents and other family members, school teachers, police officials, social worker therapists.

b.) That the repeated questioning and leading statements by the forensic interviewer, Tammy Knudson tainted the alleged child victims memory such that the alleged child victim was not competent under the Rules of Evidence, to testify, as the alleged child victim's memory of the events had been tainted by this repeated questioning, interviewing, leading statements and counseling.

c.) An expert would have determined that a highly advanced inquiry into the atmosphere and demeanor surrounding the verbal interactions between the alleged child victim and concerned adults was necessary to determine whether the alleged child victim's memory was tainted.

[¶9.] Counsel failed to supply Appellant with the promised information, facts, documents, papers, notes, reports or transcripts:

a.) Counsel failed to comply with Appellant's repeated reasonable requests for information, facts, documents, papers, reports, notes as was required of a reasonable attorney, pursuant to Rule 1.4 of the North Dakota Rules of Professional Conduct,

b.) Counsel failed to supply Appellant with sufficient information to participate intelligently in discussions concerning the representation and

The entering of the plea of guilty during the original proceeding.

C.) Appellant was unable to make an intelligent and knowing decision as to whether to plead out or go to trial.

[410] Counsel failed to effectively communicate with appellant on any matter, except a few short periods before each court hearing.

a.) Appellant was completely unaware of any relevant research which was being conducted by counsel. And in fact was only made aware of this lack of relevant research and investigation after pleading guilty on advice of Counsel, against Appellant's wishes. When Appellant finally received a copy of Counsel's file, when Appellant was incarcerated at the James River Correctional Center.

[11.] Counsel failed in his duty to represent Appellant with the promised skill, thoroughness, legal knowledge, preparation and diligence, for which he was paid.

a.) Counsel failed in his promised duties, which he was paid for and which are required of a reasonable attorney.

b.) Counsel's performance was clearly below the prevailing "Professional norms", which are required under Rule (1.1), (1.3) and (1.4) pursuant to the North Dakota Rules of Professional Conduct.

[12.] The North Dakota Rules of Professional Conduct set out the foundation and basic duties which are required of a reasonable Attorney. It is clear in the present matter Counsel's failed in these "principles" and "basic duties" during both the original proceeding by failing to investigate the statements made by the alleged child victim and the witnesses.

¶13] The North Dakota Rules of Professional Conduct are the prevailing "professional norms" are the "basic duties" and "principles" which are required of a reasonable attorney. Counsel failed in these "principles" and "basic duties" by failing to do the "Promised" and required work for the \$50,000.00 U.S. Dollars.

¶14] The question under the first test in Strickland is whether or not the failure to conduct any relevant investigation or to hire an expert to investigate the statements made by the alleged child victim and the witnesses by counsel is deficient conduct. SEE, Strickland, At 687. All appellant argues that it is. Counsel is presumed to have prepared and investigated and then communicated all options with Appellant.

¶15] Investigating all known facts, statements and evidence are simply a basic part of practicing law. By failing to do any investigation on his own or hiring an expert to investigate, was deficient below the standard in the community.

[¶16] The second test in Strickland, is essentially that Appellant was prejudiced by counsel's lack of knowledge, investigation and advice, and would that prejudice have made a difference in the outcome. SEE, STRICKLAND at 694.

Appellant argues that he was prejudiced, and counsel's errors and advice did make a difference in the outcome.

When representing a defendant counsel must be competent in the basic part(s) of practicing law. Such as investigating all known facts, statements and evidence.

[¶17] when negotiating a guilty plea, knowledge of the relevant facts, statements and evidence and an investigation into all underlying facts is essential, and counsel's failure here was unreasonable and prejudiced Appellant.

[¶18] The prejudice occurred as Appellant would have more thoughtfully considered trying the case before a jury, but for counsel's failure to prepare,

investigate, hire an expert and communicate with Appellant, and upon advice of counsel this option was effectively denied to Appellant. Had Appellant known that Counsel had failed in his duties, Appellant would have replaced him, and put the State to the test at trial, and disputed the case as charged. The uninformed and poor advice of Counsel made a difference in the outcome of the case and sentence, and the outcome would have been different had counsel given accurate and informed advice and information to Appellant. Appellant was inherently misled and uninformed by Counsel's deficient performance and advice.

[¶19] In the context of a guilty plea, the prejudice prong of the Strickland test governing a claim of ineffective assistance of counsel is satisfied if the Appellant shows that there is a reasonable probability that, but for Counsel's errors, Appellant would not have pleaded guilty and would have

insisted on going to trial. SEE, Patten v. State, 2008, ND 29 ¶¶, 745 NW.2d 626.

In the present case Appellant would not have pled guilty, but for the advice of Counsel. therefore, the adversarial process itself was presumptively unreliable during the proceeding. SEE, U.S. v. Cronin, 466 U.S. at 659 (1984) It is clear in this situation prejudice occurred.

[20] Appellant has shown a manifest injustice has resulted from the plea of guilty on ineffective advice of Counsel, and therefore the court abused its discretion and was without jurisdiction to sentence Appellant to a term of incarceration. SEE, North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L. Ed. 2d 162 (1970) STATE v. McKay, 234 NW.2d 853 (ND 1975)

There is a reasonable probability that but for these unprofessional errors of Counsel, the result of the original proceeding would have been different. Had Counsel, during the original proceeding, done even a perfunctary

Job there is a very good chance Appellant would not have plead guilty

[¶21.] Clearly Appellant did not enter his plea knowingly or intelligently and thus, the withdrawal of the plea is necessary to correct a manifest injustice. SEE, State v. Barnes, 2007 N.D. 15, ¶16, 726, NW. 2d 595.

[¶22.] Each claim of ineffective assistance of Counsel here supports ineffectiveness on their own, as each error is sufficiently egregious and prejudicial. SEE, United States v. Cronin, 466 U.S. 496, 91 L.Ed. 2d 397, 106 S.Ct. 2639 (1968) Clearly there were multiple errors here, which each on their own prejudiced Appellant and made counsel's performance Constitutionally defective.

[¶23] Appellant was not accorded the Counsel guaranteed by the Sixth Amendment. And clearly below the "Objective standard of reasonableness"

"Considering prevailing professional norms." SEE, STRICKLAND v. Washington; 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) Clark v. State, 2008 ND 234, ¶12, 758 N.W.2d 909, SEE ALSO N.D.R. Prof. Conduct.

[¶24.] While Appellant believes that his fifth, sixth and fourteenth Amendment protections are enough, he believes that he should be afforded even greater Constitutional protection under Article I, Section 12 of the North Dakota Constitution, especially regarding his due process rights and right to effective assistance of counsel. SEE, State v. Klott, 298 N.W.2d 783 (ND 1980) The emphasis of Article I, section 12 of the North Dakota Constitution should be on protecting an individual's right to due process and effective assistance of counsel, rather than simply just guaranteeing it. SEE, State v. Rydberg 519, N.W. 2d 306, 310 (ND 1994).

[¶25] CONCLUSION

[#26] The District Court's order must be reversed, The criminal Judgement must be vacated, and Appellant must be allowed to withdraw his guilty plea.

[#27] Respectfully Submitted this — day
of MAY, 2015.



Nathan Dubray
#39395


James River Correctional Center
2521 Circle Drive
Jamestown, North Dakota 58401

[428] CERTIFICATE OF SERVICE

[429] I hereby certify that I served,
by United States MAIL (Prison mail Box system)
true and correct copies of the foregoing
Rule 24, Supplemental Statement of
Petitioner / Appellant Nathan Dubray upon:

Monty G. Mertz
Supervising Attorney
Fargo Public Defender's Office
912 3rd Avenue South
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[430] Dated this 27th day of MAY, 2015



NATHAN Dubray

[431] Certificate of Non-Compliance

[432] I hereby certify that I am incarcerated
at the James River Correctional Center
at Jamestown, North Dakota and inmates
are not allowed to use word processor's
or Computers for any legal work

and further inmates are not allowed to file any papers or documents electronically or by any other means than United States Mail.

[#33] Dated this 27th day of May, 2015



NATHAN Dubray #39395
James River Correctional Center
2521 Circle Drive
Jamestown, North Dakota 58401

original

20140428

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SUPREME COURT

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 28 2015

NATHAN Dubray,
Petitioner/Appellant,
vs.

STATE OF NORTH DAKOTA

Case no. 2014 0428

STATE OF NORTH DAKOTA,
Respondant/Appellee,

CERTIFICATE OF SERVICE

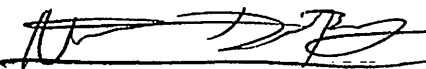
① I hereby certify that I served, by United STATES mail (Prison Mail Box System) a true and correct copy of the Rule 24, Supplemental Statement of Petitioner/Appellant Nathan Dubray upon:

Mark Jason McLarthy

P.O. Box 5607

Grand Forks, north Dakota 58206-5607

② Dated this 27th day of May, 2015


Nathan Dubray

20140428

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 24, 2015
STATE OF NORTH DAKOTA

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Nathan Dubray,	)	Supreme Court No. 20140428
)	
Petitioner/Appellant,)	
	)	District Court No. 18-2014-CV-00960
vs.)	
)	
State of North Dakota,)	
)	
Respondent/Appellee.)	

ON APPEAL FROM DENIAL OF POST-CONVICTION RELIEF
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE DEBBIE KLEVEN, PRESIDING

BRIEF OF APPELLEE

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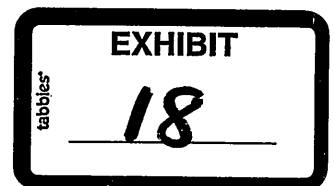


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Secondary Sources

Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*,
58 N.Y.U.L.Rev. 299, 343 (1983) ¶6

STATEMENT OF THE ISSUE

- I. Whether the district court properly denied Dubray's motion for post conviction relief?**

LAW AND ARGUMENT

I. The district court properly denied Dubray's motion for post-conviction relief.

[¶1] Post-conviction relief hearings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Patten v. State, 2008 ND 29 ¶8, 745 N.W.2d 626. The issue of ineffective assistance of counsel is a mixed question of law and fact that is fully reviewable by the North Dakota Supreme Court. Id. However, a trial court's findings of fact in a post-conviction relief proceeding will not be disturbed unless clearly erroneous. Id. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made. Id.

[¶2] An application for post-conviction relief seeking to withdraw a guilty plea is treated as a motion to withdraw guilty plea under N.D.R.Crim.P. 11(d). Moore v. State, 2013 ND 214, ¶10, 839 N.W.2d 834. Withdrawal of the guilty plea is allowed only when necessary to correct a manifest injustice. Id. A guilty plea must be done freely and voluntarily and when a defendant has entered into a plea at advice of counsel, only the voluntary and intelligent character of the guilty plea can be challenged. Id. at ¶11; Lindsey v. State, 2014 ND 174, ¶17 (quoting Damron v. State, 2003 ND 102 ¶9, 663 N.W.2d 650). Unless the defendant can establish "serious derelictions" on the part of the defendant's attorney that kept a plea from being knowingly and intelligently made, the defendant will be bound by that guilty plea. Damron at ¶13 (citing McMann v. Richardson, 397 U.S. 759, 774 (1970)). The defendant has the burden to present evidence to overcome the presumption that defense counsel is competent and adequate,

and to do so, the defendant must point to specific errors made by trial counsel. Id.

[¶3] In the case at hand, Dubray alleges that ineffective assistance of trial counsel. This Court has stated that an applicant for post-conviction relief bears a “heavy burden” to prevail on an ineffective assistance of counsel claim. Lindsey v. State, 2014 ND 174, ¶19, 852 N.W.2d 383. The petitioner must show that 1) counsel’s representation fell below an objective standard of reasonableness and 2) that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. (citing Strickland v. Washington, 466 U.S. 668, 688, 694 (1984)). This two-part test under Strickland applies to challenges of guilty pleas based on an ineffective assistance of counsel claim. Id. (citing Hill v. Lockhart, 474 U.S. 52, 58 (1985)). A defendant must demonstrate both deficient representation by counsel and prejudice caused by the deficient representation. Id. This Court has stated that the first prong is measured using “prevailing professional norms,” and is satisfied if the defendant proves counsel’s conduct consistent of errors serious enough to result in denial of counsel guaranteed by the Sixth Amendment. Id. (citing Sambursky v. State, 2006 ND 223, ¶13, 723 N.W.2d 524; Strickland, 466 U.S. at 687). The second prong of the Strickland test is satisfied in the context of a guilty plea if the defendant shows there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial. Id. (citing Ernst v. State, 2004 ND 152, ¶10, 683 N.W.2d 891).

[¶4] In order for Dubray to establish that the district court’s denial of his post-conviction relief application to withdraw his guilty plea was clearly erroneous, he must establish that the district court erred when determining that there was not a manifest

injustice resulting in Dubray being permitted to withdraw his guilty plea. In order to establish such a standard based on ineffective assistance of counsel, Dubray must first successfully argue that Hankey's representation of him fell below an objective standard of reasonableness. Second, Dubray must be able to establish that even if Hankey's representation of him fell below an objective standard of reasonableness that there is a reasonable probability that, but for Hankey's alleged errors, he would have insisted on going to trial. Dubray could not establish either prong at the district court level. Further, on appeal Dubray cannot establish either prong and therefore the district court's denial of his application for post-conviction relief was not clearly erroneous.

A. Hankey's representation did not fall below an objective standard of reasonableness.

[¶5] On appeal, trial tactics, such as the decision to call certain witnesses, hire private investigators, and whether to depose or how to question certain witnesses are not second-guessed. Noorlun v. State, 2007 ND 118, ¶12, 736 N.W.2d 477 (citing State v. Austin, 2007 ND 30, ¶32, 727 N.W.2d 790). Strategic choices by trial counsel made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. Id. In Rummer v. State, Rummer claimed that trial counsel was ineffective and alleged that his counsel failed to adequately investigate scientific evidence. Rummer v. State, 2006 ND 216, ¶14, 722 N.W.2d 528. The district court, however, found that the trial counsel's strategy was an appropriate strategy among other alternatives in light of all the other evidence presented. Id. Further, the district court found that simply because another attorney may have proceeded differently, did not make the trial counsel's strategy below minimal standards. Id.

[¶6] This Court has stated that judicial scrutiny of counsel's performance must be highly deferential. State v. Skonsby, 417 N.W. 2d 818, 828 (N.D. 1987). Further, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. The defendant must overcome the presumption that under the circumstances the challenged action may be considered sound trial strategy. Id. Further, in Strickland, the United States Supreme Court has acknowledged that there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. Strickland v. Washington, 466 U.S. 689-690 (1984) (citing Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299, 343 (1983)).

[¶7] In this case, Dubray alleges that Hankey's performance fell below an objective standard of reasonableness because he did not depose the victim, interview other witnesses who were not present for the crime, or hire an expert to challenge the forensic interview. However, this Court has specifically recognized that each of those specific complaints fall within the sound purview of trial strategy. Hankey testified that he did not find it to be a useful or effective strategy to depose a victim or witnesses in a criminal case in advance of trial. Post-Conviction Relief Hearing Tr. pp. 40-46. Hankey testified that it is his trial strategy to wait until trial to cross-examine the witnesses so as to prevent the State and the State's witnesses from knowing his defense and questions in advance. Post-Conviction Relief Hearing Tr. pp. 40-46. Hankey testified that he spent time watching and analyzing the forensic interview and that he did not feel that it would be an effective use of time or money to hire an expert to challenge the apparently sound and professional forensic interview that was completed with the victim. Post-Conviction

Relief Hearing Tr. pp. 29-32. Additionally, Dubray complains Hankey did not file a motion in limine regarding Dubray's prior bad acts. Hankey testified that he did not do so because the State had not filed a Rule 404(b) Notice to introduce any prior bad acts and that, to his knowledge, the State had no intent on offering them. Post-Conviction Relief Hearing Tr. pp. 38, 39. As the Court has recognized in Rummer and Noorlun, the decisions made by Hankey are decisions that do not fall below the wide range of reasonable professional assistance. Hankey considered many options and chose a strategy he felt most appropriate when counseling Dubray. This Court will not engage in hindsight and simply because appellate counsel may have represented Dubray in a different matter, does not mean Hankey's assistance was ineffective. Dubray cannot meet the first prong required to establish ineffective assistance resulting in a manifest injustice and therefore, his appeal should be denied.

[¶8] It should also be noted that pursuant to Rule 24 of the North Dakota Rules of Appellate Procedure, Dubray was permitted by the North Dakota Supreme Court Clerk to file a Supplemental Statement. Rule 24 of the North Dakota Rules of Appellate Procedure provides that an indigent defendant in a criminal case represented by counsel may file a Supplemental Statement with the North Dakota Supreme Court. N.D.R.App.P. 24. This Court has previously stated that post-conviction relief proceedings are civil in nature. Flanagan v. State, 2006 ND 76, ¶9, 712 N.W.2d 602. In the Supplemental Statement, Dubray reiterates issues raised by counsel regarding the forensic interview and private investigator/witness interviews. Dubray claims Hankey failed to provide him with "information, facts, documents, papers, notes, reports or transcripts. This allegation is not supported by the record. In a post-conviction relief proceeding, the Petitioner bears

the burden to establish grounds for relief. Id. at ¶10. During the evidentiary hearing, Dubray admitted to being provided the discovery materials. Post-Conviction Relief Hearing Tr. p. 5. Additionally, exhibits were entered into evidence at the evidentiary hearing establishing that Dubray was sent discovery and supplemental discovery. Post-Conviction Relief Evidentiary Hearing Exhibits 1-2. There is no testimony or evidence to support Dubray's claim raised for the first time on appeal. Further, issues not raised in a post-conviction relief application at the district court level cannot be considered on appeal. Everett v. State, 2015 ND 149, ¶16, No. 20140288, 2015 WL 3622253 (N.D.).

B. Even if Hankey's representation fell below an objective standard of reasonableness, there is not a reasonable probability that, but for Hankey's alleged errors, Dubray would have insisted on going to trial.

[¶9] The second prong of Strickland requires a defendant to show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Ernst v. State, 2004 ND 152, ¶10, 683 N.W.2d 891. In Lindsey v. State, the defendant claimed that she received ineffective assistance of counsel because her attorney failed to provide her transcripts of interviews with a psychologist, that she was coerced, and that she was heavily medicated when she entered her plea. Lindsey v. State, 2014 ND 174, ¶¶20-23, 852 N.W.2d 383. However, this Court recognized that the transcript reflected the defendant entered her plea voluntarily and was advised of all the rights she was giving up. Id. Additionally in the Rummer case, this Court addressed specifically the argument of whether an additional witness would have changed the result in a case. This Court stated that a defendant must offer evidence that any additional witnesses would have aided the defense's claim Rummer at ¶12.

[¶10] In this case Dubray alleges that Hankey should have deposed witnesses, hired an expert, and filed a motion in limine to prevent prior bad acts from coming in. With respect to the witnesses, Dubray never once explained to the district court or this Court on appeal how deposing any witnesses would have resulted in any different information. Dubray and the eight-year-old victim were the only people present when the molestation took place. The other witnesses, as Hankey testified, were not relevant to the ultimate issue, as to whether the molestation happened. Post-Conviction Relief Hearing Tr. pp. 40-46. Further, the State had taken no action to notice out prior bad acts and in fact, most of the information regarding any prior bad acts were only detailed in the pre-sentence investigation which took place only after Dubray entered his guilty plea. Post-Conviction Relief Hearing Tr. p. 46. Dubray does not detail how hiring an expert to testify regarding the forensic interview would have ultimately changed Dubray's decision to enter a guilty plea. It is Dubray's burden to establish to the district court, and on appeal, to this Court, how but for Hankey's alleged errors, he would have insisted on going to trial. There is no information for this Court or the district court to rely on that would explain how the result of the proceeding would have been different. Depositions of the witnesses would have resulted in no additional information about the molestation. Dubray has not explained what information they could have obtained that would have changed his decision. The forensic interview was completed professionally and appropriately. Dubray has not alleged otherwise nor has he explained what information an expert witness would or could have provided that would have resulted in him persisting with a not guilty plea and proceeding to trial. As in Lindsey, Dubray was read his rights. He stated his pleas of guilty were made freely and voluntarily. Change of Plea

Hearing Tr. p. 7. He stated that he had not been threatened or promised anything in an effort to plead guilty. Change of Plea Hearing Tr. p. 7. He acknowledged that there had been a jury questionnaire done and jurors were ready to report. Change of Plea Hearing Tr. p. 7. Dubray indicated he understood he was waiving his right to jury trial and his right to face the witnesses the State may call. Change of Plea Hearing Tr. p. 7. Dubray acknowledged that he understood he could receive a sentence up to life in prison. Change of Plea Hearing Tr. p. 8. Dubray specifically stated that he had enough time to discuss this case with his attorneys and that he was satisfied with the representation he received from his attorneys. Change of Plea Hearing Tr. p. 8. At the post-conviction relief hearing, Dubray never alleges that he was coerced into pleading guilty. In fact, he does not even allege his plea was not voluntary. Post-Conviction Relief Hearing Tr. pp. 12-13. Instead, he alleges that he was led to believe he would be found guilty “no matter what”. Post-Conviction Relief Hearing Tr. pp. 12-13. Hankey specifically testified that, although Dubray made it difficult to keep in contact with, he had sat down with Dubray on several occasions, went through the discovery with him and discussed the strengths and weaknesses of the case. Post-Conviction Relief Hearing Tr. pp. 34-38. Further, Hankey testified that one of the Assistant State’s Attorneys involved in the case also detailed for Dubray and Hankey the State’s evidence. Post-Conviction Relief Hearing Tr. pp. 34-38. Hankey testified that he does not advise his clients to plead guilty or not. Post-Conviction Relief Hearing Tr. pp. 34-38. Instead, he presents the facts to his client and the risks and benefits of proceeding to trial and ultimately lets the client make the decision. Post-Conviction Relief Hearing Tr. pp. 34-38.

[¶11] Dubray himself provided the most enlightening testimony of the Post-

Conviction Relief hearing. Dubray specifically acknowledged that he did tell the district court on July 15, 2013 when he changed his plea that he was satisfied with Hankey's representation. Post-Conviction Relief Hearing Tr. p. 16. Dubray further stated that the only thing that had changed between July 15, 2013 when he entered guilty pleas to October 20, 2014 at the Post-Conviction Relief hearing as to the quality/satisfaction with his representation by Hankey was the amount of time in which he was sentenced. Post-Conviction Relief Hearing Tr. p. 16.

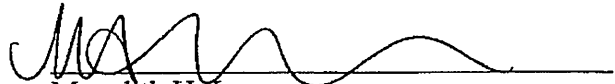
[¶12] Dubray has the burden to establish both prongs of Strickland. Not only can the first prong not be established regarding the quality of Hankey's representation, but the second prong also cannot be established. In light of the fact that the Court and Mr. Hankey, both explained in detail the possibility of being sentenced to life in prison, simply being upset with the length of the sentence received does not amount to ineffective assistance of counsel. Finally, Dubray alleges that because the district court's order sets forth the wrong standard; whether but for counsel's errors there would have been a different result if this case were tried to a jury, this Court should reverse the district court's decision. The State concedes that the standard set forth in Lindsey v. State is whether but for counsel's alleged errors Dubray would have persisted in his not guilty plea. However, this Court has stated that it will not set aside a correct result based on correct reasoning under the wrong law if the results would have been the same under the correct law. Investors Title Ins. Co. v. Herzig, 2010 ND 169, ¶40, 788 N.W.2d 312. The district court appropriately determined Dubray could not meet either prong of the Strickland test; counsel's performance was not deficient and a different result was not probable but for any alleged deficiency. Therefore, the district court's decision denying

Dubray post-conviction relief should be affirmed.

CONCLUSION

[¶13] For the above-stated reasons, Dubray's appeal should be denied.

DATED this 24 day of June, 2015.



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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Nathan Dubray,)	Supreme Court No. 20140428
)	
Petitioner/Appellant,)	
	)	District Court No. 18-2014-CV-00960
vs.)	
)	
State of North Dakota,)	
)	
Respondent/Appellee.)	
)	

AFFIDAVIT OF SERVICE
BY E-MAIL
SA#121086

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 24 day of June, 2015, she served via e-mail true copies of the following documents:

BRIEF OF APPELLEE

and that said email was served on the address of:

Monty G. Mertz and said e-mail address is: fargopublicdefender@nd.gov

At the office of the Grand Forks County State's Attorney's Office.


States Attorney's Office

Subscribed and sworn to before me this 24 day of June, 2015.

24 day of June, 2015.

Jennifer Alvstad
Notary Public

JENNIFER ALVSTAD

dj

JENNIFER ALVSTAD
Notary Public
State of North Dakota
My Commission Expires March 26, 2021

20140428

FILED
IN THE OFFICE OF THE
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JUNE 25, 2015
STATE OF NORTH DAKOTA

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Nathan Dubray,	)	Supreme Court No. 20140428
)	
Petitioner/Appellant,)	
	)	District Court No. 18-2014-CV-00960
vs.)	
)	
State of North Dakota,)	
)	
Respondent/Appellee.)	
)	

AFFIDAVIT OF SERVICE
BY E-MAIL
SA#121086

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FOLKS)

The undersigned, being of legal age, being first duly sworn deposes and says that on the 26 day of June, 2015, she served via e-mail true copies of the following documents:

BRIEF OF APPELLEE

and that said email was served on the address of:

Charles J. Sheeley and said e-mail address is: sheeleylawnd@gmail.com

At the office of the Grand Forks County State's Attorney's Office.

Markene Jensen
States Attorney's Office

Subscribed and sworn to before me this 25 day of June, 2015.

Notary Public

dj

JENNIFER ALVSTAD
Notary Public
State of North Dakota
My Commission Expires March 26, 2021

20140428

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 8, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20140428

Nathan Dubray,

Appellant,

vs.

State of North Dakota,

Appellee.

2014-CV-00960

APPELLANT'S REPLY BRIEF

Appeal from the November 20, 2014, Order Denying Application for
Post-Conviction Relief
the Honorable Debbie G. Kleven, Presiding

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ATTORNEY FOR APPELLANT



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[¶ 3] LAW AND ARGUMENT

I. Counsel was defective and Mr. Dubray was prejudiced by the defective representation.

[¶ 4] The government urges this Court find that Nathan Dubray's trial attorney's decision to forgo depositions of witnesses; decision to forgo having an expert review video of an interview with a child; decision to forgo filing any 404(b) pretrial motions; and decision to have his client meet with the government attorney for the government attorney to outline his case were "trial strategy." (Appellee Br., ¶¶ 5, 6, 7). The government's position is untenable. Mr. Dubray was on the eve of trial for two AA Felonies with no real trial strategy except to cross-examine the witnesses. (Post-conviction Tr. p. 42, ll. 6-8). On the eve of trial, Mr. Dubray had little idea beyond what was written in police reports of what witness testimony might be. On the eve of trial, there was no investigation into whether the child may have been coached or otherwise targeting Mr. Dubray instead of another individual. On the eve of trial, no expert on behalf of Mr. Dubray had reviewed the interview of the child to look for discrepancies in how the interview was handled or other factors Mr. Dubray might be able to utilize at trial. On the eve of trial, Mr. Dubray was confronted with the unanswered question of whether two other unsubstantiated allegations of child molestation would be used against him to convict him for this charge. Finally, on the eve of trial Mr. Dubray was confronted by not only his attorney's lack of preparation, but also the

opposite – he was able to listen to everything the government attorney had done in preparation, and listen in a private meeting how the government attorney planned to convict him. (Post-Conviction Relief Tr. p. 34, ll. 10-25, p. 35, ll. 107). The government can label this “trial strategy,” but the explanations behind the labels are implausible and void of any substance. It is incredulous to argue that in a child sex case and on the eve of trial, mere cross-examination preparation amounts to effective representation. It is understandable that Mr. Dubray felt he had no decision but to plead guilty to something he did not do. The allegations could have put him in prison for the rest of his life. Counsel should have, at the very least, interviewed witnesses prior to trial; should have hired an expert to attempt to rebut the government’s two experts; and should have ensured Mr. Dubray through pretrial motions that prior, unsubstantiated allegations would remain out of the trial. Counsel’s representation was deficient and fell below the “prevailing professional norms.” See Sambursky v. State, 2006 ND 223, ¶ 13, 723 N.W.2d 524. The Court should require a higher standard of representation than what was provided here and find the first Strickland prong was met.

[¶ 5] To demonstrate prejudice, Mr. Dubray must show that but for his counsel’s errors, there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial. Bahtiraj v. State, 2013 ND 40, ¶ 15, 840 N.W.2d 605. The prejudice factor was established

by Mr. Dubray's strenuous attempt to withdraw his guilty plea before he was sentenced. This is more than the "self-serving" statement provided in Bahtiraj. Id. at ¶ 16. Had Mr. Dubray been properly counseled, he would not have pleaded guilty and the result would have been different.

II. Mr. Dubray's attempt to withdraw his guilty plea through post-conviction proceedings should be reviewed under the "fair and just" standard.

[¶ 6] Mr. Dubray unequivocally moved to withdraw his guilty plea prior to being sentenced on October 4, 2013. (Sentencing Hearing Tr. p. 3, ll. 4-24). The district court essentially ignored his request, and demanded the case proceed to sentencing. (Sentencing Hearing Tr. p. 4, ll. 21-25). In doing so, the district court ignored the standard the Court and North Dakota Rules of Criminal Procedure require: That Mr. Dubray need only show a fair and just reason to withdraw his plea. State v. Lium, 2008 ND 33, ¶ 17, 744 N.W.2d 775; N.D.R.Crim.P. 11(d). The district court's failure to properly consider the motion was obvious error and warrants withdrawal of Mr. Dubray's plea.

[¶ 7] An individual should be allowed to withdraw his guilty plea after entering the plea but before sentencing for any fair and just reason unless the prosecution has been prejudiced by reliance on the plea. Lium, 2008 ND 33, ¶ 17; N.D.R.Crim.P. 11(d). (Rule 11(d)) "should be liberally construed in favor of the defendant, and that leave to withdraw a guilty plea before

sentencing should be freely granted.” State v. Feist, 2006 ND 21, ¶ 21, 708 N.W.2d 870.

[¶ 8] Here, Mr. Dubray, through counsel, requested to withdraw his guilty plea prior to the sentencing hearing. (Sentencing Hearing Tr. p. 3, ll. 4-24). Mr. Dubray’s counsel made the request, and also made a somewhat subtle hint that perhaps he should withdraw from representation of Mr. Dubray. (Sentencing Hearing Tr. p. 5 ll. 5-17). Nonetheless, the district court demanded the case be heard for sentencing that morning. (Sentencing Hearing, p. 4, l. 15). The sentencing court’s basis for denying the request to withdraw were victim-based: that “we owe it to the victim to bring this to an end” and that the “victim does deserve some conclusion to this case” (Sentencing Hearing Tr. p. 4, l. 15; p. 6, l. 14). Neither of these factors were advocated for by the government’s attorney, nor are they factors that should be considered under the “fair and just” plea withdrawal standard. The factor that should have been considered - Mr. Dubray’s claim of innocence - was simply ignored by the district court. The district court committed obvious error in evaluating Mr. Dubray’s motion to withdraw. Mr. Dubray’s right to jury trial was compromised by the district court’s error. An obvious error that affects substantial rights may be considered even though it originally was not brought to the court’s attention. N.D.R.Crim.P. 52(b). This is an exceptional circumstance which this Court should take notice and order Mr.

Dubray's pleas be withdrawn, or the matter remanded for a hearing on the motion to withdraw.

[¶ 9] Counsel's performance was further deficient for failing to challenge the denial of a plea withdrawal through the post-trial motions offered by the district court. Counsel had a duty to follow through with representation for Mr. Dubray after judgment was entered but he failed to do so.

[¶ 10] **CONCLUSION**

[¶ 11] Counsel's failure to depose witnesses, hire an expert to rebut the government's two experts, and file pretrial motions to litigate the admissibility of prior allegations against Mr. Dubray amounts to deficient representation. Further, counsel's failure to follow through with Mr. Dubray's request to withdraw his guilty plea fell below the professional norms expected of attorneys in North Dakota. Had counsel been effective, Mr. Dubray would have insisted on going to trial. In fact, Mr. Dubray attempted to withdraw his guilty plea prior to even being sentenced.

[¶ 12] In addition, this Court should find the district court's analysis of Mr. Dubray's request to withdraw his motion was flawed. The court failed to follow the "fair and just" standard and instead imposed a victim-based standard not authorized by law in denying Mr. Dubray's motion to withdraw his guilty plea. This Court should Order the guilty plea withdrawn or, at the least, remand the case to the district court for a hearing on the motion to withdraw the guilty plea.

Dated this 8th day of July, 2015.

/s/ Charles Sheeley

Charles J. Sheeley (#06383)

SHEELEY LAW, P.C.

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Facsimile: (701) 356-4209

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ATTORNEY FOR APPELLANT

[¶ 13] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail
on 8th day of July, 2015, to: sasupportstaff@gfcounty.org;
Meredith.larson@gfcounty.org; and jason.mccarthy@gfcounty.org

/s/ Charles Sheeley

Charles J. Sheeley

FILED BY CLERK
SUPREME COURT

OCT 13 2015

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2015 ND 244

Nathan G. Dubray,

Petitioner and Appellant

v.

State of North Dakota,

Respondent and Appellee

No. 20140428

Appeal from the District Court of Grand Forks County, Northeast Central
Judicial District, the Honorable Debbie Gordon Kleven, Judge.

AFFIRMED.

Per Curiam.

Charles J. Sheeley (argued), 3332 Fourth Ave. S., Ste. 2D1, Fargo, ND
58103, for petitioner and appellant.

Mark J. McCarthy (argued) and Meredith H. Larson (on brief), Assistant
State's Attorneys, P.O. Box 5607, Grand Forks, ND 58206-5607, for respondent and
appellee.

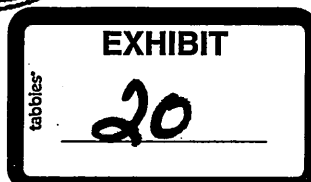
STATE OF NORTH DAKOTA }
IN THE SUPREME COURT } SS.

I, Penny Miller, Clerk of the Supreme Court
within and for the State of North Dakota, do
hereby certify that the above and foregoing is
a full, true and correct copy of the original, as
the same remains on file in my said office.

IN WITNESS WHEREOF, I have hereunto
set my hand and affixed the Seal of said Court
at Bismarck, this 12th day of November 20 15

Penny Miller
Clerk, Supreme Court

by Sarah E. Erick, deputy
Clerk



Dubray v. State

No. 20140428

Per Curiam.

[¶1] Nathan Dubray appeals from a district court order denying his application for post-conviction relief. In 2013, Dubray pled guilty to two counts of gross sexual imposition, a class AA felony. Dubray applied for post-conviction relief claiming ineffective assistance of counsel and seeking to withdraw his guilty pleas and proceed to trial. After an evidentiary hearing, the district court denied his application. Dubray appealed, arguing the district court committed reversible error in denying his application claiming his guilty pleas were not voluntary because he received ineffective assistance of counsel and was prejudiced by his trial counsel's failure to (1) hire a private investigator; (2) depose witnesses; (3) move to exclude evidence; and (4) communicate all known facts to Dubray. Dubray also argues the district court applied the wrong standard to the second prong of its analysis. Courts need not address both prongs of the Strickland test if a court can resolve the case by addressing only one prong. Rencountre v. State, 2015 ND 62, ¶ 7, 860 N.W.2d 837. We conclude the district court's finding that Dubray's trial counsel's representation did not fall below an objective standard of reasonableness is not clearly erroneous. Therefore, we summarily affirm under N.D.R.App.P. 35.1(a)(2).

[¶2]

Gerald L. Kunkle, C.J.
John F. McDevitt
W.D. Cottle
Dave Larson
Carol Hennings-Jones

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT

Supreme Court No. 20140428
Grand Forks County Case No. 2014-CV-00960

Appeal from the district court for Grand Forks County.

Nathan G. Dubray,

Petitioner and Appellant

v.

State of North Dakota,

Respondent and Appellee

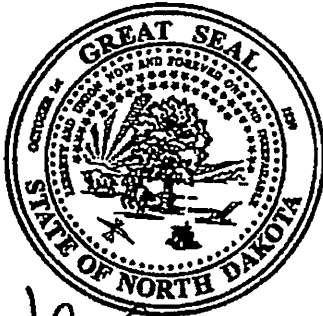
[¶1] This appeal having been heard by the Court at the September 2015 Term before:

[¶2] Chief Justice Gerald W. VandeWalle, Justice Dale V. Sandstrom, Justice Carol Ronning Kapsner, Justice Daniel J. Crothers, and Justice Lisa Fair McEvers;

[¶3] and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the order of the district court is AFFIRMED under N.D.R.App.P. 35.1(a)(2).

[¶4] This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court on the date it is issued to the district court under N.D.R.App.P. 40.

Dated: October 13, 2015



ATTEST:

Penny Miller
Clerk

By the Court:

Gerald W. VandeWalle
Chief Justice

STATE OF NORTH DAKOTA } SS.
IN THE SUPREME COURT

I, Penny Miller, Clerk of the North Dakota Supreme Court, do hereby certify that the foregoing is a complete and correct copy of the judgment of the Supreme Court entered in the above entitled action. The same, together with the opinion of the Court, is hereby transmitted to the Court below as the mandate of the Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court

this 12th day of November 20 15

Penny Miller
Clerk of the Supreme Court
by *Sarah E. Erick*, deputy
Clerk

IN DISTRICT COURT, GRAND FORKS COUNTY, STATE OF NORTH DAKOTA


State of North Dakota,	)	MOTION TO WITHDRAW GUILTY PLEA
Plaintiff,)	
vs.)	
Nathan G. Dubray,	)	Crim.Case No. 18-2012-CR-01960

[¶1] COMES NOW, Nathan G. Dubray the above-named Defendant ("Defendant"), pro se, and hereby respectfully requests the Honorable Court to allow Defendant to withdraw his guilty plea, entered during the Sentencing of October 4, 2013, before the Honorable Debbie G. Kleven, Judge of the District Court, on the two underlying offenses in this matter.

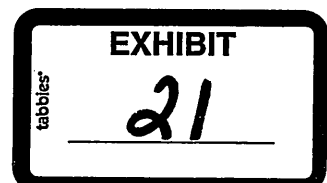
[¶2] PLEASE TAKE NOTICE, that Defendant has requested a hearing on this Motion. (See, REQUEST FOR HEARING ON DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA, within).

[¶3] PLEASE TAKE FURTHER NOTICE, that Defendant has requested the appointment of counsel for the requested hearing on this Motion at public expense.

[¶4] Dated this 22 day of December, 2015.



Nathan G. Dubray, pro se
James River Correctional Center, Inmate #39395
2521 Circle Drive
Jamestown, ND 58401



IN DISTRICT COURT, GRAND FORKS COUNTY, STATE OF NORTH DAKOTA

State of North Dakota,	)	AFFIDAVIT OF NATHAN G. DUBRAY
Plaintiff,	)	IN SUPPORT OF MOTION TO WITH-
vs.	)	DRAW GUILTY PLEA
Nathan G. Dubray,	)	Crim.Case No. 18-2012-CR-01960
Defendant.)	

[¶1] Nathan G. Dubray, the above-named Defendant, being first duly sworn on oath, states and alleges as follows:

[¶2] That Affiant is the Defendant in the above-entitled action.

[¶3] That on July 15, 2013, Affiant plead guilty to both of the underlying offenses in the above-entitled matter, pursuant to an Alford plea at a change of plea hearing.

[¶4] That multiple times prior to the sentencing hearing of October 4, 2013, Affiant informed his attorney Mr. Hankey that Affiant wanted to withdraw his guilty pleas prior to sentencing. Further, Affiant wanted Mr. Hankey to present this request to the Court.

[¶5] That Mr. Hankey failed to file the requested motion to withdraw guilty plea papers, prior to the sentencing hearing of October 4, 2013.

[¶6] That during the sentencing hearing of October 4, 2013, Mr. Hankey informed the Court that Affiant had requested to

withdraw his guilty pleas pursuant to N.D.R.Crim.P. 11(d)(B) (ii) which allows withdrawal of guilty pleas for any fair and just reason prior to sentencing.

[¶7] That the Court decided to proceed with the sentencing hearing, but the Court indicated that Affiant could file a motion supported by a brief and affidavit and allow the State to respond, and that if Affiant could show a fair and just reason, Affiant would be allowed to withdraw his guilty pleas.

[¶8] That the prosecution would not have been prejudiced in any manner had Affiant been allowed to withdraw his guilty pleas.

[¶9] That the prior unfounded allegations of sexual misconduct against Affiant improperly played a role in Affiant pleading out, along with Mr. Hankey's representation which amounted to little more than a cursory review of the State's Discovery and the Clerk's Record.

[¶10] That had Mr. Hankey fully provided Affiant with information concerning the outcome of the Alford pleas, Affiant would not have plead out to these offenses and Affiant would have insisted on a jury trial.

[¶11] That Affiant's pleas to the underlying offenses in this matter were not voluntary due to Mr. Hankey's serious derelictions. Mr. Hankey failed to hire an expert to interpret

the forensic video; informed Affiant that with "this judge" there were "hefty sentences" after a loss at trial; failed to file a motion as to the unfounded alleged prior sexual misconduct; failed to request a pretrial hearing on the issue of hearsay evidence as is required under law; failed to hire a private investigator which Affiant paid for; failed to take any depositions which Affiant paid for; failed to interview any witnesses; did not articulate any theory or defense or go over discovery with Affiant.

[¶12] That Affiant was placed in such a position by Mr. Hankey that Affiant felt he had no choice but to plead guilty, and not based upon confidence in Mr. Handey's advice.

[¶13] That Affiant's pleas were based upon being helpless to make a knowing, intelligent and voluntary waiver of his right to a trial.

[¶14] Dated this 22 day of December, 2015.

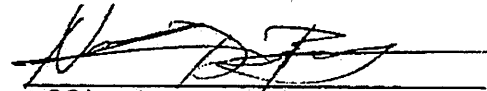


Nathan G. Dubray, Affiant, pro se
James River Correctional Center, Inmate #39395
2521 Circle Drive
Jamestown, ND 58401

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF STUTSMAN)

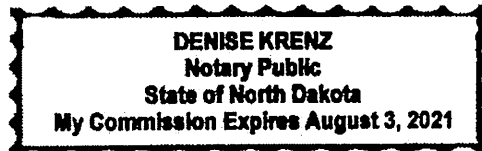
[¶15] Nathan G. Dubray being first duly sworn on oath, deposes

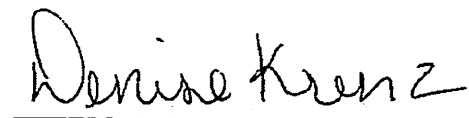
and says that he is the Defendant in the above-entitled action; that he has read the **AFFIDAVIT OF NATHAN G. DUBRAY IN SUPPORT OF MOTION TO WITHDRAW GUILTY PLEA** within and knows the contents thereof and that the same is true, except as to matters stated therein upon information and belief and as to those matters he states that he believes them to be true.


Affiant

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF STUTSMAN)

[¶16] On the 22 day of December, 2015, before me, a Notary Public, in and for the county and state, personally appeared Nathan G. Dubray, known to me to be the person who is described in and who executed the **AFFIDAVIT OF NATHAN G. DUBRAY IN SUPPORT OF MOTION TO WITHDRAW GUILTY PLEA** within and acknowledged to me that he executed the same.




Notary Public

IN DISTRICT COURT, GRAND FORKS COUNTY, STATE OF NORTH DAKOTA

State of North Dakota,	)	BRIEF IN SUPPORT OF MOTION TO
Plaintiff,	)	WITHDRAW GUILTY PLEA
vs.)	
Nathan G. Dubray,	)	Crim.Case No. 18-2012-CR-01960
Defendant.)	

[¶1] COMES NOW, Nathan G. Dubray, the above-named Defendant ("Defendant"), pro se, and hereby respectfully requests the Honorable Court to allow Defendant to withdraw his guilty plea, entered during the Sentencing of October 4, 2013, before the Honorable Debbie G. Kleven, Judge of the District Court, on the two underlying offenses in this matter.

[¶2] Defendant asserts his pleas were not voluntary due to his attorney, Mr. Hankey's serious derelictions. All Mr. Hankey did, was to study the materials disclosed in discovery by the prosecutor and the record by the Clerk. Mr. Hankey did not interview, nor did he depose any witnesses, either for the State or the defense. He did not interview the alleged child victim or the alleged child victim's mother. Mr. Hankey did not file a motion in limine as to the alleged prior sexual misconduct by Defendant. Mr. Hankey articulated no theory of defense to Defendant.

[¶3] Defendant agreed to Alford pleas of guilty on the eve of his jury trial, because of Mr. Hankey's failures and advice and because the unfounded prior allegations loomed as a dark cloud over Defendant. Mr. Hankey only reviewed the

basic discovery and clerk's record and did literally nothing more, but convince Defendant to a plea deal on two AA felonies.

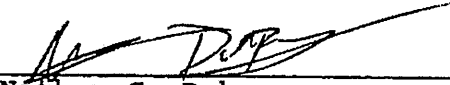
[¶4] It is clear from the trial transcripts and the post-conviction hearing transcripts that Defendant requested and informed Mr. Hankey he wanted to remove the pleas of guilty entered at the change of plea hearing of July 15, 2013. Mr. Hankey failed to file the proper motion paper to withdraw the guilty pleas. Mr. Hankey did make a oral motion to withdraw the guilty pleas at the sentencing hearing of October 4, 2013. Mr. Hankey informed the Court that Defendant wanted to withdraw his guilty pleas pursuant to N.D.R.Crim.P. 11(d)(B)(ii), which allows withdrawal of guilty pleas for any fair and just reason prior to sentencing.

[¶5] The Trial Court decided to proceed with the sentencing hearing, referring to State v. Moore, presumably State v. Moore, 2005 ND 183, 709 N.W.2d 21, although nothing in that per curiam opinion lends support to the procedure the Court followed. The Court indicated that Defendant could file a motion supported by a brief and affidavit and allow the State to respond, and if Defendant could show a fair and just reason, he would be allowed to withdraw his pleas, but the Court would proceed with sentencing.

[¶6] There can be no "fair and just" pleas of guilty, when Mr. Hankey neither filed a motion to withdraw the guilty pleas, despite being invited to do so, nor did he file a

direct appeal, even as being paid \$50,000.00 to do just such, and Mr. Hankey did no independent investigation or preparation and basically planned to try the case by the seat of his pants. Defendant was placed in such a position by Mr. Hankey that he felt he had no choice but to plead guilty, which was not based upon confidence in his attorney's advice after a thorough investigation and preparation. And there is no indication in the record that the Prosecution would have been prejudiced in any manner had Defendant been allowed to withdraw his guilty pleas.

[¶7] Dated this 22 day of December, 2015.



Nathan G. Dubray, pro se
James River Correctional Center, Inmate #39395
2521 Circle Drive.
Jamestown, ND 58401

IN DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

State of North Dakota,

Plaintiff,

v.

Nathan Gene Dubray,

Defendant.

**STATE'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO WITHDRAW
GUILTY PLEA**

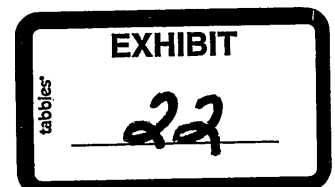
Court No. 18-2012-CR-01960

SA#121086

[¶1] On December 28, 2015, the State received a Notice of Motion and Motion to Withdraw Guilty Plea, Brief in Support of Motion to Withdraw Guilty Plea, Affidavit of Nathan Dubray in Support of Motion to Withdraw Guilty Plea, and Request for Hearing. The State resists Defendant's request.

[¶2] Mr. Dubray fails to provide any law or case law in support of his request to withdraw his guilty plea. After a court has accepted a guilty plea and the defendant has been sentenced, a guilty plea may not be withdrawn unless withdrawal is necessary to correct a manifest injustice. State v. Farrell, 2000 ND 26, ¶ 8, 606 N.W.2d 524. Not only has Dubray failed to establish he suffered a manifest injustice, Mr. Dubray fails to even argue or attempt to articulate that he suffered one. Rather Dubray argues his attorney failed to adequately prepare for trial and/or investigate the case after having been paid a large sum of money.

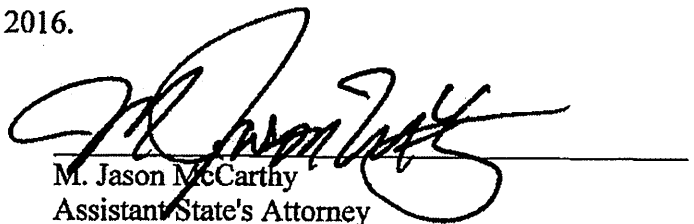
[¶3] Mr. Dubray's request could be viewed as a motion for a new trial under Rule 33 of the North Dakota Rules of Criminal Procedure. That Rule sets a 14 day deadline for filing such a motion absent newly discovered evidence. Dubray is approximately 2 years past this deadline and has failed to provide the Court with newly discovered evidence.



[¶3] Mr. Dubray previously argued to the Court that his trial counsel was ineffective in his Petition for Post Conviction Relief. His arguments in his pending motion are strikingly similar to the rejected claims made in his failed bid for post-conviction relief. As such, should the Court view Defendant's request to withdraw his guilty plea under the spirit and terms of the Post Conviction Relief Act the State respectfully requests that Dubray's request be denied on the grounds of res judicata as these claims of ineffectiveness were fully and finally determined in a previous proceeding and/or misuse of process as the specific claim the trial counsel failed to withdraw the guilty plea was inexcusably not raised in the post conviction proceeding. N.D.C.C. § 29-32.1-12; See also Jensen v. State, 2004 ND 200, ¶ 9, 688 N.W.2d 374 (ruling that post-conviction relief is not warranted when defendants assert claims that are merely variations of previously rejected claims); Silvesan v. State, 1999 ND 62, ¶ 12, 591 N.W.2d 131 (raising issues in a second post-conviction application which could have been raised in the first was a misuse of process).

[¶4] Wherefore, the State respectfully requests that Dubray's motion be denied.

DATED this 7th day of January, 2016.



M. Jason McCarthy
Assistant State's Attorney
ND Bar ID #05656
124 South 4th Street
PO Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
E-Service Address: sasupportstaff@gfcounty.org

MJM/dj

In District Court, Grand Forks County, North Dakota**State of North Dakota,****Plaintiff,****v.****Nathan G. Dubray,****Defendant.****Case No. 18-2012-CR-1960****Order Denying Application
For Court-Appointed Attorney and
Order Denying Motion to
Withdraw Guilty Plea**

¶1 Defendant entered guilty pleas to two counts of Gross Sexual Imposition, class AA felonies. An Amended Criminal Judgment was entered on January 3, 2014. Defendant did not appeal from the Amended Criminal Judgment. Defendant filed an Application for Post-Conviction Relief in Case No. 18-2014-CV-960 alleging ineffective assistance of counsel and seeking to withdraw his guilty pleas and proceed to trial. This Court granted Defendant's request for a court-appointed attorney for the post-conviction relief petition and held an evidentiary hearing. Following the hearing, this Court denied the Application for Post-Conviction Relief, and Defendant appealed the decision to the North Dakota Supreme Court. Defendant was represented by court-appointed counsel during the appeal. The North Dakota Supreme Court affirmed the trial court's decision. Dubray v. State, 2015 ND 44. Defendant now requests the Court appoint an attorney to represent him in the filing of a Motion to Withdraw Guilty Plea in this case.

¶2 Defendant fails to provide any legal support for his request for court-appointed counsel. The Amended Judgment was entered on January 3, 2014, and Defendant did not file a timely appeal from the criminal judgment. Since the time for an appeal has expired, this Court finds the criminal case has concluded and there is nothing pending before the Court other than the Motion to Withdraw Guilty Plea, which is discussed below. The Guidelines to Determine Eligibility for Indigent Defense Services provide that a Defendant has a right to counsel when charged with a

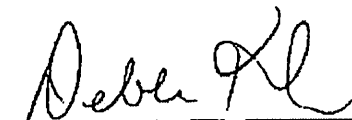
felony, in a post-conviction proceeding, and in appeal of a criminal conviction or post-conviction determination. In this case, Defendant was afforded counsel through sentencing and did not appeal the conviction. Likewise, he was provided with court-appointed counsel in the appeal of the post-conviction determination and during the appeal. Consequently, under the facts of this case, this Court finds Defendant is not entitled to court-appointed counsel.

¶3 N.D.R.Crim.P. 11(d) sets forth the grounds for withdrawing a guilty plea. A guilty plea may only be withdrawn after sentencing unless the defendant proves that withdrawal is necessary to correct a manifest injustice. Here, Defendant argues that because of ineffective assistance of counsel, his guilty pleas were not voluntary. This is the same argument Dubray advanced in his Petition for Post-Conviction Relief. The Court finds the Motion to Withdraw Guilty Plea on the claim of ineffective assistance of counsel was fully and finally determined in the post-conviction proceedings.

¶4 It is hereby ordered Defendant's Application for Court-Appointed Counsel and the Motion to Withdraw Guilty Plea are denied.

Dated: January 11, 2016

By the Court:

A handwritten signature in black ink, appearing to read "Debbie Kleven", written over a horizontal line.

Debbie G. Kleven
District Judge

Cc: Nathan Dubray, 2521 Circle Dr., Jamestown, ND 58402
M. Jason McCarthy, Assistant State's Attorney